Volume 42, Number 12
June 8, 2016

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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ISSN 0364-7625.

Washington Focus: A coalition of open government groups has sent a letter to Senate Majority Leader Mitch McConnell (R-KY), Senate Minority Leader Harry Reid (D-NV), Senate Armed Services Committee Chair John McCain (R-AZ), and Senate Armed Services Committee Ranking Member Jack Reed (D-RI) urging them to support proposed amendments offered by Sen. Charles Grassley (R-IA) and Sen. Patrick Leahy (D-VT) to remove three Exemption 3 provisions in the National Defense Authorization Act of 2017 (S. 2943). The letter explained that one exemption would exclude information on military tactics, while a second provision dealt with critical infrastructure information. Arguing that FOIA exemptions should be considered by the committees with FOIA jurisdiction, the letter urged the Senators to support the Grassley-Leahy amendments. The letter indicated that "the Pentagon's proposed FOIA carve-outs are bad for transparency and accountability and should not be included without the input of the Judiciary Committee."

Court Finds Online Privacy Reports Protected by Exemption 4

Judge Amit Mehta has ruled that disclosure of most of the information contained in annual reports submitted to the Federal Trade Commission by companies that offer safe harbor programs for websites and online services directed at young children that are required to comply with the Children's Online Privacy Protection Act is protected under both the competitive harm and impairment prongs of Exemption 4. Although Congress gave the FTC the authority to promulgate a Children's Online Privacy Protection Rule, once that rule was established, the online privacy policies were to be largely self-enforced. In 2013, the FTC began to require that safe harbor programs submit annual reports "to better ensure that all safe harbor programs keep sufficient records and that the Commission is routinely apprised of key information about the safe harbors' programs and membership oversight." In requiring the annual reports, the FTC also noted that they would be useful in "informing the Commission of the emergence of new feasible parental consent mechanisms for operators."

The Center for Digital Democracy requested the first batch of annual reports submitted in 2014. The agency located six annual reports that had been submitted—a total of 88 pages—disclosed two pages in full, 36 pages with redactions, and withheld 56 pages entirely. The agency claimed Exemption 4 (confidential business information) and Exemption 3 (other statutes), citing Section 6(f) of the Federal Trade Commission Act, which largely parallels Exemption 4's coverage. The agency identified eight categories of information it considered exempt, but the Center for Digital Democracy only challenged three of those categories—(1) interpretations and analyses of the COPPA Rule; (2) membership statistics and market shares; and (3) remediation and disciplinary rates.

The agency argued that disclosure of the withheld portions would both impair the agency's ability to obtain information in the future and would likely cause competitive harm to the safe harbor program operators. Mehta agreed the agency had shown that both prongs of the *National Parks* test applied to the withheld records. First addressing the impairment claim, Mehta indicated that "the potential for impairment in gathering information is not limited to the question whether an agency has power to compel disclosure in the future." Although case precedent on impairment has frequently concluded that an agency's access to information cannot be impaired if it can compel a submitter to provide the information, Mehta explained that "rather, it encompasses the possibility that suppliers of information, as a consequence of public disclosure, will narrowly construe the government's request and thereby seriously impair the government's information-gathering ability." This is an argument that has frequently been used by submitters to suggest that the quality of information is just as important as the quantity, but has usually been discounted because submitters have their own incentive to provide a sufficient amount of information to satisfy government regulators. But under these unique circumstances, Mehta's observation is probably apt. He noted that both the quality and quantity of the reports varied dramatically, largely because the FTC's reporting requirements were so vague and open to interpretation. Coupled with the fact that these reports were the first of their kind, the quality and quantity of data reported by the safe harbor operators likely would reflect on the ability of the companies to interpret the reporting requirements.

Indeed, Mehta explained that "it is reasonable to conclude that the prospect of public disclosure provides a disincentive to safe harbor programs to provide information to the FTC." He added that "it is not difficult to fathom that, in the future, in order to avoid public disclosure of information that they consider proprietary or confidential, safe harbor programs would reduce the amount and kind of information that they provide to the FTC." The Center argued that if the FTC found it was not getting sufficient information, it could just revise the reporting requirements. Mehta found this solution impractical and indicated that "Congress set up a largely self-regulating marketplace, driven by industry standard-setting, to promote compliance with COPPA. No doubt Congress knew that information from private enterprises would be more difficult for the public to obtain under FOIA. But that is the balance it struck." He observed that "the nonpublic analyses, if revealed, at most would disclose the inner workings of private safe harbor programs. It would tell the public little, if anything, about how the FTC itself operates."

The Center did not contest the agency's claims as much as it argued that disclosure of the data would be in the public interest because it would allow safe harbor program operators to learn from each others' experiences. But Mehta pointed out that in *Public Citizen Health Research Group v. FDA*, 185 F.3d 898 (D.C. Cir. 1999), the D.C. Circuit had rejected the argument that disclosure was in the public interest because it might improve the way companies conducted clinical trials. Instead, the D.C. Circuit emphasized that the only public interest balance in FOIA was to shed light on government activities or operations. Mehta noted that "so it is here. Plaintiff's argument that the COPPA Rule would function better if safe harbor programs' interpretations of the Rule were made public does not bolster the case for disclosure. Indeed, the impact that public disclosure would have on the efficacy of the COPPA Rule is irrelevant."

The Center also argued that disclosure would not cause competitive harm because much of the information was publicly available online. Dismissing that argument, Mehta indicated that "the fact that the safe harbor programs' guidelines and commentary are public does not divest a company's specific application of those guidelines of commercial value. In a marketplace where companies compete. . .how a company interprets the COPPA Rule in a specific setting may well give it a competitive advantage."

Mehta found that membership statistics and remediation and disciplinary rates could cause competitive harm if disclosed. He agreed with the agency's determination that "the disclosure of discipline rates is likely to cause substantial competitive harm because competitors could use that information to convince potential customers that a rival is too strict or too lenient." (*Center for Digital Democracy v. Federal Trade Commission*, Civil Action No. 14-02084 (APM), U.S. District Court for the District of Columbia, June 1)

Views from the States…

The following is a summary of recent developments in state open government litigation and information policy.

District of Columbia

A court of appeals has ruled that the D.C. Metropolitan Police Department improperly rejected a request from the Fraternal Order of Police for emails to or from U.S. Attorney General Eric Holder or Washington attorney Mark Tuohey, as well as any emails mentioning the Washington D.C. Police Foundation over a period of four years because the department concluded the requests were too burdensome. Although the agency did ultimately respond, the court also found that it had not adequately explained its search. FOP also sent its request to the Office of the Chief Technology Officer, which initially indicated that it could not search for the records as described. The police department limited its search to email accounts of eight high-ranking officials, locating 1400 pages of emails. OCTO indicated that it would need to search 39,000 emails to determine if they were responsive. MPD subsequently indicated that it had found 16,000 more responsive pages that it said had been mailed to FOP in 25 to 35 envelopes. After filing suit, FOP tried to determine for the first time how many emails it had received from MPD, concluding that it had received only several hundred rather than the 1400 pages claimed by MPD. The trial court ruled in favor of MPD after finding that its search had been adequate. At the appeals court, MPD argued that it had not been obligated to respond to FOP's requests because they were too broad. But the appeals court found the requests were sufficient and noted that "there is nothing in the statute that allows a prospective determination of undue burden to void a FOIA request." The appeals court agreed with FOP that MPD did not explain why it limited the search to email accounts of eight officials. The appeals court pointed out that "we do not know and cannot simply assume, in this age of computerized connectivity, that it would be unreasonable for MPD's FOIA officer to search all of MPD's email accounts, regardless of how many accounts that might be." The same lack of explanation applied to OCTO. The appeals court observed that "perhaps it is nonetheless unreasonable to ask OCTO to run searches of all MPD email accounts, but if that is the case, OCTO must explain why." Noting a history of animosity between MPD and FOP that had resulted in multiple FOIA litigation between the two parties, the appeals court faulted both sides, suggesting they appeared more interested in gamesmanship than in receiving the requested records. As a result, the court ordered the parties to work with a mediator in an attempt to resolve their dispute. (*Fraternal Order of Police v. District of Columbia*, No. 13-1146, District of Columbia Court of Appeals, May 26)

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New Hampshire

The supreme court has ruled that while the trial court used the wrong standard for assessing the applicability of the attorney work product privilege to records concerning litigation over the constitutionality of buffer zones at abortion clinics those records are privileged under the proper standard as well. The supreme court also agreed that information identifying individuals who appeared in video and written records concerning Planned Parenthood clinics in New Hampshire should be withheld under the privacy exemption. The case involved several requests under the Right to Know Law filed by New Hampshire Right to Life for records concerning the clinics of Planned Parenthood of Northern New England. After New Hampshire Right to Life filed suit against the New Hampshire Charitable Trusts Unit, the New Hampshire Board of Pharmacy, and the New Hampshire Department of Health and Human Services, the trial court ruled in favor of the agencies' responses that produced some records with redactions and withheld others. The trial court had assessed the applicability of the attorney work product privilege by using New Hampshire common law, finding that the agencies had properly claimed the privilege. But the supreme court pointed out that the records involved federal litigation over the buffer zone and that, thus, the privilege should be examined using federal common law. Regardless, the supreme court found the federal common law applied to completely protect the records. New Hampshire Right to Life argued that the privilege was waived because the records were shared with the New Hampshire Attorney General and with state attorney generals in other states. The supreme court disagreed. The supreme court noted that "we cannot say that the exchange of email messages between the AG and such offices in other states was inconsistent with keeping those messages, and the documents they referenced, from the plaintiffs in the buffer zone litigation." The trial court had agreed with the agencies that identifying information should be withheld under the privacy exemption. The supreme court noted that while it was unclear the extent to which certain individuals identified in surveillance footage of the pro-life protestors at the Planned Parenthood clinics had an expectation of privacy, after balancing the privacy interests against the weak public interest, including the fact that individuals at abortion clinics were sometime harassed, the supreme court concluded that the privacy exemption applied. (*New Hampshire Right to Life v. Director, New Hampshire Charitable Trusts Unit, et al.*, No. 2015-0366, New Hampshire Supreme Court, June 2)

New York

A second court of appeals has approved of the use of a *Glomar* response, a federal judicial gloss allowing an agency to neither confirm nor deny the existence of records when disclosure would threaten an applicable exemption, for records concerning the New York City Police Department's interest in conducting surveillance of activities of New York-area Muslim activists. In response to requests by several local activists, the New York City Police Department had invoked a *Glomar* response. When the requesters sued, the trial court found that the *Glomar* response was not proper under the Freedom of Information Law. The appeals court noted that "the affidavits submitted by NYPD's Chief of Intelligence establish that confirming or denying the existence of records would reveal whether petitioners or certain locations or organizations were the targets of surveillance and would jeopardize NYPD investigations and counterterrorism efforts. The records sought here are a subset of the records found properly exempt under FOIL." The court observed that "by this decision, we do not suggest that any FOIL request for NYPD records would justify a Glomar response. [But], in view of the heightened law enforcement and public safety concerns identified in the affidavits of NYPD's intelligence chief, Glomar responses were appropriate here." (*In re Talib W. Abdur-Rashid v. New York City Police Department*, New York Supreme Court, Appellate Division, First Department, June 2)

The Federal Courts…

A federal court in Montana has ruled that the Secret Service properly withheld records from Deanna McAtee concerning her indictment for wire fraud related to real estate transactions involving Whitefish Credit Union. The charges against McAtee were dropped several months later. McAtee later filed a FOIA request with the Secret Service, part of which was referred to the Executive Office for U.S. Attorneys by the agency. The Secret Service finished its response about a year later, providing 450 pages in full, 163 pages with redactions, and withholding 41 pages in full. McAtee appealed the agency's decision, but filed suit before the appeal was resolved. Two months later, the agency upheld its denial on appeal. EOUSA, however, did not respond to the referral until seven months later, releasing three pages in full and withholding 29 pages in full. McAtee argued the Secret Service's **search** was inadequate because it had taken so long. The court agreed with the agency that her timeliness claim was moot once she received a response. The court noted that "because McAtee does not dispute that she has received a final response to her request and she does not allege a pattern or practice of untimely responses, her timeliness claim is moot." The court rejected McAtee's contention that the referral to EOUSA was also improper. The court pointed out that "McAtee has now received a complete, albeit belated, response from the Executive Office. Aside from the delay that the referral caused—now a moot issue—the Secret Service's referral procedure is in line with the recommended procedures for processing documents originating with other agencies." But the court was concerned that McAtee had not yet had an opportunity to challenge the withholdings made by EOUSA, noting that "at this time, the Court is without sufficient information to analyze the applicability of the claimed exemptions and make a segregability determination as to the 29 pages. Additionally, the Court cannot review the response until after McAtee has exhausted the appeals process as to the Executive Office's response. Because the propriety of the 29 withheld pages is not properly before the Court on the current motions, the parties shall file a joint stipulation addressing the status of and proposed resolution for those pages." The Secret Service has withheld some records under **Exemption 3 (other statutes)**, citing Rule 6(e) on grand jury secrecy. The court found the agency's explanations conclusory at this point, explaining that "although some of the requested records may fall under Exemption 3, the Secret Service has not yet supplied sufficient information for the Court to make that determination. Thus, the Secret Service shall submit a supplemental *Vaughn* index with sufficient detail as to the pages withheld or redacted under Exemption 3." The agency had also withheld personally-identifying information throughout the records under **Exemption 6 (invasion of privacy)** or **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. McAtee argued the Secret Service had not identified the privacy interests in the redactions. The court, however, noted that the agency's affidavit "plainly identifies the stigma of being associated with an investigation and reasons that the public interest is diminished because names and identifying information reveal nothing about the conduct of the agency." McAtee indicated that she was alleging misconduct on the part of Whitefish employees. The court observed that "the requester's reason for seeking the information, however, is irrelevant to the Court's analysis." (*Deanna McAtee v. United States Department of Homeland Security*, Civil Action No. 15-84-M-DWM, U.S. District Court for the District of Montana, Missoula Division, May 31)

In yet another opinion in his resolution of multiple FOIA requests submitted to the Department of Justice by prisoner Jeremy Pinson, Judge Rudolph Contreras has ruled that the Executive Office for U.S. Attorneys has still not shown that it conducted an **adequate search** for some of Pinson's requests, but that for others Contreras deemed the agency's explanation of its search sufficient. The descriptions of many of Pinson's requests to EOUSA sound like text-book fishing expeditions designed to waste the agency's time and resources. Almost all of them were for records of various named cases in districts across the country with no apparent connection to Pinson in any way. While the agency initially deflected some requests where third

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party defendants were named by claiming the agency could not disclose any information for privacy reasons, Pinson was successful in arguing that he was requesting only public record information in the cases. Contreras noted in reference to one such request that "the fact that the agency did produce some records indicates that the documents are *not* confined to third parties, despite the agency's initial claims to the contrary." For some requests the agency disclosed records, but for others the agency claimed it could find no records. Contreras declined to grant summary judgment to the agency on those requests, indicating that such responses failed to explain the manner in which the agency searched for responsive records. But for several requests Contreras was satisfied the agency had explained with sufficient detail how the search was conducted. For those requests he granted the agency's motion for summary judgment. (*Jeremy Pinson v. U.S. Department of Justice*, Civil Action No. 12-1872 (RC), U.S. District Court for the District of Columbia, June 1)

A federal court in Louisiana has awarded immigration attorney Michael Gahagan **attorney's fees** for his FOIA litigation against U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection for records pertaining to his client Theodore Weegar, who was facing deportation. Gahagan sent FOIA requests to USCIS, ICE, and CBP, as well as the Department of State for records about Weegar. ICE referred the request to USCIS and Gahagan filed suit after the agencies failed to respond. He eventually got most of the documents he was requesting and then filed a motion for attorney's fees. The court found that because Gahagan has prevailed on some issues he was eligible for fees. Although the agencies argued that he was using FOIA as a substitute for discovery, which is not available in immigration proceedings, the court indicated that "the public benefit factor weighs in favor of an award of attorney's fees because the disclosure of the documents contributes to the legitimacy of the immigration proceedings." Noting the Supreme Court had held that agencies were to construe the exemptions narrowly, the court concluded that the agencies' intransience and redactions were unreasonable. The court then found that Gahagan was not entitled to an hourly rate of $300, but rather a reduced rate of $200 an hour. The court also reduced the number of hours Gahagan had claimed, explaining that there was no evidence that he had exercised discretion in calculating the hours. Rejecting Gahagan's claim that he was an experienced FOIA litigator, the court observed that "Gahagan's time records reflect the hours of an attorney who has to research and draft motions working from a blank slate, rather than an attorney with expertise in the matter and experience in FOIA litigation. Although it is prudent to ensure there wasn't any intervening caselaw, the sheer number of hours spent on researching and drafting in an area Gahagan claims to have expertise in is excessive." As a result, the court reduced the number of hours by 25 percent, reducing his request from $34,777 to $16,485. (*Michael Gahagan v. United States Customs and Border Protection*, Civil Action No. 14-2619, U.S. District Court for the Eastern District of Louisiana, June 1)

Ruling on another of immigration attorney Michael Gahagan's motions for **attorney's fees**, a federal court in Louisiana has ruled that Gahagan is not entitled to attorney's fees because there was no evidence that his suit to gain access to a record showing his client had applied for U.S. citizenship through a relative furthered the public interest or that the U.S. Citizenship and Immigration Services had acted unreasonably. Gahagan had urged the court to award attorney's fees based on recent awards in several other cases. But the court noted that "it is clear that Gahagan is not *entitled* to attorney's fees." The court explained that "Gahagan here only sought a single record for use in his client's removal proceedings. He had no larger purpose aimed at benefitting the public. . ." The court added that "this Court cannot fathom any way in which that request sheds light on immigration policies. The process and policy here are quite apparent—all Gahagan needed was proof that his client had taken the step of applying for permanent resident status. . .The release of this form here only served to help Gahagan's client, Mr. Patterson, and Gahagan himself." The agency did not contend that Gahagan was primarily motivated by a commercial interest, but the court observed that "it is evident that Gahagan received some indirect commercial benefit through the receipt of the document because he is now

able to more effectively advocate for his client and maintain the reputation of his law practice, which is undeniably a commercial endeavor." Because Gahagan had failed to show the existence of any public interest benefit from disclosure of the record and because the agency had acted properly, the court indicated Gahagan was not entitled to attorney's fees. (*Michael W. Gahagan v. United States Citizenship and Immigration Services*, Civil Action No 15-796, U.S. District Court for the Eastern District of Louisiana, June 3)

A federal court in Maryland has dismissed Lacy Williams' requests to the Department of Justice and the National Archives and Records Administration for unspecified records dealing with the enslavement of African Americans in the United States over the past 600 years. Williams, a prisoner incarcerated in North Carolina, also requested the government pay him reparations for the enslavement of his ancestors. In dismissing the suit, the court noted that "here, Williams submitted sweeping requests for genealogical and other historical information covering a period of over 600 years, with no other identifying details. Williams made no attempt to narrow the range of his request after request requirements were explained to him. Williams was not provided records because the requests were insufficiently specific to enable a search under the parameters of FOIA or the Privacy Act." The court observed that "absent withholding of documents after a FOIA request that is sufficiently specific to enable location of records, there is no violation of the statute." (*Lacy Lee Williams v. U.S. Department of Justice, et al.*, Civil Action No. PWG-16-512, U.S. District Court for the District of Maryland, Southern Division, May 27)