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Washington Focus: In response to a lawsuit filed by Villanova Professor David Barrett citing the recently enacted 25-year rule for disclosing records protected by the deliberative process privilege, the CIA has posted Volume 5 of its history of the Bay of Pigs, even though it had successfully defended its claim that the document was privileged in a lawsuit brought by the National Security Archive. Considered by many to be the top bauble that would emerge as a result of the new amendment which states that the deliberative process privilege does not apply to records more than 25-years old, the CIA decided not to challenge Barrett's lawsuit but quietly disclosed the document instead. Writing in Secrecy News, Steve Aftergood noted that according to Barrett Volume 5, which was assumed to be a critical review of the agency's behavior during the Bay of Pigs operation in 1961 is, in reality, a criticism of the agency's Inspector General's report on the operation. Barrett told Aftergood that the volume is "not quite earth-shattering history, but I think the real story is that the CIA spent much effort and money over the past five years to prevent [release] of this document."

Reasons for Decision Not Protected by Exemption 7(C)

A federal court in California has agreed with freelance journalist Irvin Muchnick that U.S. Citizenship and Immigration Services is required to disclose most of the information it redacted from the Alien File of George Gibney, a former Irish Olympic swim coach who had been accused of sexually assaulting young swimmers, because it would reveal why the U.S. government allowed Gibney to immigrate to the U.S. in 1994, despite the substantial allegations against him.

Muchnick, an investigative journalist, was writing a book on sexual abuse in amateur athletics. Because of a string of well-publicized incidents involving coaches and managers who had been associated with the now defunct Irish Amateur Swimming Association, Muchnick became interested in Gibney's case. A former Irish Olympic swim coach, Gibney was accused of multiple counts of sexual abuse dating back

to the 1960s. However, he escaped prosecution when the Irish Supreme Court in 1994 ruled that the statute of limitations had run. Gibney left Ireland and went to Scotland and then on to the United States, where he still lives. To learn the reasons why Gibney was allowed to immigrate to the United States, Muchnick made a request to USCIS for Gibney's visa, green card and other related records. In response to Muchnick's request, the agency located 102 pages in Gibney's Alien File. The agency disclosed four pages and withheld 98 pages, primarily under Exemption 7(C) (invasion of privacy concerning law enforcement records) and Exemption 7(E) (investigative methods and techniques).

Judge Charles Breyer had previously found the agency's *Vaughn* index insufficient. At the time of his decision here, only 20 documents consisting of 43 pages remained in dispute. Addressing the agency's supplemental index, Breyer observed that "its supplemental *Vaughn* Index, in all candor, fares little better." However, Breyer had reviewed the records *in camera* and indicated that as a result of that review he was prepared to rule on the agency's exemption claims. Muchnick claimed that the agency had not shown a rational nexus between a legitimate law enforcement purpose and Gibney's Alien File. But Breyer disagreed, noting that "there can be no doubt that DHS compiled George Gibney's A-File for legitimate law enforcement and adjudicative purposes. Exemption 7(C) is in play."

Having found that Exemption 7(C) applied, Breyer pointed out that *Reporters Committee* created a presumption that personal information in law enforcement records was normally protected unless the plaintiff could show that disclosure would shed light on government operations or activities. But he also cited to a recent Ninth Circuit decision, *Kowack v. U.S. Forest Service*, 766 F.3d 1130 (9th Cir. 2014), noting that "at the same time, privacy interests in information fade when members of the general public, 'already know' about it." He then pointed out that "Gibney finds little shelter under *Reporters Committee*. At least as to allegations of sexual abuse, his A-File is no 'compilation of otherwise hard-to-obtain information.' Anyone who bothers Googling his name can get their hands on the sordid details of his alleged crimes." Acknowledging the notoriety of the accusations against Gibney, Breyer indicated that "Gibney has 'no privacy interests' in preventing disclosure of the widely known allegations swirling around him. And without a privacy interest, there can be no invasion of personal privacy, let alone an unwarranted one." He explained that "accordingly, DHS may not withhold under Exemption 6 or 7(C) portions of documents merely reciting criminal allegations against Gibney." But he noted that "the public does not have easy access to information about Gibney's past addresses, salary history, and—most relevant here—immigration decisions made by DHS. Gibney retains a privacy interest in such information."

Breyer next turned to the public interest in disclosure, observing that when alleging government misconduct the plaintiff must provide evidence sufficient to warrant a belief in a reasonable person that the government impropriety may have occurred. He noted that "Muchnick has made that showing. Charges against Gibney came to light no later than 1993. In 1994, the Irish Supreme Court put an end to the case—not for lack of evidence, but because the statute of limitations had run. This was no secret. But it did not stop American authorities from allowing Gibney to enter the United States and remain here ever since. So although the information Muchnick seeks 'is tied solely to one individual,' much of it sheds light on multiple decisions by multiple DHS personnel. It details what they knew about Gibney's past and when they knew it. Those details shed light on DHS's performance of its statutory duties, and most certainly lets citizens know 'what their government is up to.' And given Gibney's past, it is enough to 'warrant a belief by a reasonable person' that—perhaps—more should have been done."

The agency argued that *Hunt v. FBI*, 972 F.2d 286 (9th Cir. 1992), in which the Ninth Circuit found that disclosure of sexual misconduct allegations against a single FBI agent would not shed light on the government's operations, applied here as well. Breyer, however, disagreed, pointing out that "this is a different case. For a start, the privacy interests at stake here are lower than in *Hunt*. The world already

knows about the sexual abuse allegations facing Gibney, lewd as they are. And although he has a privacy interest in DHS immigration decisions, the public has a strong interest in understanding how and why their government allowed a man with a far-worse-than-checkered past (and perhaps present) to stay here for more than two decades. In other words, the allegations here are far better substantiated than those in *Hunt*—and with them the claims of possible government malfeasance."

Breyer rejected much of the agency's Exemption 7(E) claims as well. He pointed out that "DHS has properly redacted documents that reveal the databases USCIS uses, 'coded information,' 'biometric checks,' and other technical information. Those are law enforcement 'techniques' under Exemption 7(E). The real fight here is whether DHS must disclose what those 'techniques' revealed, namely the sexual abuse accusations." DHS argued that disclosure would reveal the kind of information sought by immigration officials when conducting background checks. Breyer, however, indicated that "so long as DHS redacts *how* it obtained information about Gibney, disclosing *what* it found out would not disclose a law enforcement technique, procedure or guideline. That is all the more true given that the allegations here are no secret." (*Irvin Muchnick v. Department of Homeland Security*, Civil Action No. 15-3060 CRB, U.S. District Court for the Northern District of California, Nov. 2)

Thoughts from the Outside…

The following is one in a series of views and perspectives on FOIA and other information issues. The views expressed are those of the author.

Evaluating FOIA's Annual Reports
By A. Jay Wagner

In the tradition of FOIA analysis previously conducted by Harold Relyea for the Congressional Research Service, I recently completed a dissertation exploring FOIA use and implementation from 1975 to 2014. The study was premised on a database constructed of FOIA annual reports from cabinet-level departments, comprising 527 of the approximately 569 annual reports produced over the period of analysis. The quantitative study uncovered findings both expected and novel. I will briefly summarize some of the more interesting discoveries below.

The number of total requests has continued to rise over the course of the study. Since 1975, 20 percent of all requests have received denials, 16 percent prior to 1998 and 23 percent after. The data demonstrate dramatically different initial disposition patterns over the two most recent periods of analysis. From 1998 to 2007, cabinet-level departments provided a full grant to 80 percent of requests, partial denials to 17 percent of requests and full denials only three percent of the time. After 2007, only 48 percent of requests received a full grant, while another 44 percent received a partial grant and eight percent were given a full denial.

Having produced its first annual report 2003, the Department of Homeland Security has established an extraordinary FOIA record since. The department receives far and away the most requests of any cabinet-level department. From 2008 to 2014, Homeland Security has processed more than one-third of all requests. The Department of Justice was next with 13 percent, followed by the Department of Health and Human Services at 12 percent. Due to a remarkable 58 percent denial rate, Homeland Security accounts for 56 percent of all denials issued over the same period. The Department of State was the only other department to deny more than half of their processed requests.

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Despite its high public profile, Exemption 1 claims are scant. This was not always the case. In the mid-1980s, it accounted for 10 to 20 percent of all exemption claims, but in recent years Exemption 1 use has typically been less than one percent of all exemption claims, placing its use above only Exemptions 8 and 9.

As previously acknowledged by retired Penn State professor Martin Halstuk, privacy – both Exemptions 6 and 7(C) – is an enormous portion of exemption claims. Since 1998 when the subparts of Exemption 7 were required in annual reports, the privacy exemptions have accounted for 57 percent of all exemption claims.

Exemption 7, including 7(C), has consistently had significant presence – always above 30 percent of all exemption claims – but has witnessed a strong surge in usage post-2008 and now amounts for more than half of all exemption claims. The recent increase is responsive to the increased popularity of 7(C) and 7(E).

The bubble of High 2 use is evident in the data as well. Exemption 2 claims steadily increase after *Crooker* and spike after Attorney General John Ashcroft's FOIA guidance. After *Milner,* Exemption 2 use crashes to nearly nil (and High 2 use appears to shift to 7(E), as directed in the *Milner* opinion).

"Other authorities" for closure (*e.g.* "no records," "fee-related," "withdrawn," etc.), which do not figure into denial rates, accounted for 39 percent of all requests processed in the final period of analysis, 2008-2014. In 2008, half of all processed requests were closed under an "other authority" claim. "No records" closures rose precipitously after the 1986 amendments to FOIA, which codified clause (c), allowing federal agencies to provide a "no records" response in instances where records do in fact exist. "No records" closures now account for 12 percent of all requests processed annually.

Despite a striking lack of guidance and oversight in FOIA budgeting, FOIA administration has amounted to just 0.011 percent of departmental budgets over the life of the study. Fees collected from requesters have hardly subsidized administration, accounting for only six percent of all costs accrued.

Study of annual reports provides a checkered history of FOIA use and implementation. Look no further than present denial rates – 92 percent of requests receive records, yet only 48 percent receive the full complement of responsive records. Trends in exemption claims suggest implementation of FOIA is more strongly influenced by widespread public fears than the politicians in power. "Other authorities" for closure – on their surface, clerical failures – present a particularly troublesome trend in unfilled requests, posing little opportunity for recourse, as do off-statute rationales, like the Glomar response, mosaic theory and "still interested" letters. Ultimately, incremental gains appear throughout the life of the FOIA and the 2016 amendments and the codification of the "presumption of openness" provide reason for continued optimism in establishing the FOIA mechanism – to paraphrase the Supreme Court's opinion in *National Archives & Records Administration v. Favish* – not as a convenient formalism but as a structural necessity in a real democracy.

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Views from the States…

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

Louisiana

A court of appeals has ruled that a provision prohibiting prisoners from making public records requests unrelated to post-conviction relief applies equally to counsel for prisoners and that James Boren cannot proceed with his request for records of his client, Stephan Bergeron, until he identifies the post-conviction relief for which the records are requested. Boren made a request as Bergeron's attorney for Bergeron's records and St. Laudry Parish District Attorney Earl Taylor rejected the unidentified request because Bergeron would not be entitled to make such a request. Boren argued such a restriction would prevent him from normal discovery. But the court noted that "Boren, in requesting the public records as legal counsel for Bergeron, was acting in his representative capacity as his agent. As such, he has no greater rights than those of Bergeron. [The statutory provision] applies to Bergeron and requires that he identify grounds for post conviction relief in making a request for public records; thus, the same requirements must be satisfied by Boren. Retaining counsel should not enable a defendant to circumvent the provisions of [the statute]. This would yield an inequitable result in that those individuals who could afford to retain counsel would be treated differently and would be allowed freer access to the public records sought for purposes of post conviction relief than the individuals who did not have the same financial means. Additionally, such an interpretation would negate the purpose for the enactment of [the statutory provision]." (*James E. Boren v. Earl B. Taylor*, No. 15-911, Louisiana Court of Appeal, Third Circuit, Oct. 26)

Pennsylvania

A court of appeals has ruled that the Office of Open Records erred in finding the Pennsylvania Game Commission had not carried its burden of proving that records concerning a complaint about a hunting tree stand near a neighbor's property because the Commission's affidavits did nothing more than cite the statutory exemptions it applied. After a neighbor complained, the Game Commission inspected an old hunting tree stand on the property of Carla Fennell. The Commission found the hunting tree stand was too close to the neighbor's property and could not be used for hunting. Fennell requested a copy of the records concerning the incident and the Commission told her they were exempt investigative records. Fennell complained to the Office of Open Records. Fennell provided no further argument and the Commission provided a recitation of the exemptions used to deny the records. OOR found that was insufficient and ruled against the Commission. On appeal, the Commission argued OOR should be able to rule on the merits of straightforward cases regardless of the amount of evidence provided by the agency. The appeals court agreed. The court noted that "to the extent that OOR construed our holdings to suggest that the failure of the Commission to submit affirmative evidence amounted to some sort of default, automatically precluding its ability to sustain its burden to show that the records were exempt from disclosure, we believe it has misconstrued our precedent." The court observed that "plainly, the General Assembly intended the request to be a substantive part of the record. Moreover, since the hearing officer is required to consider 'the information filed concerning the request,' but is not required to take evidence, the legislature must have intended that the issue could be decided without the submission of evidence where appropriate, such as where the facts are undisputed by the parties. In such a circumstance, we see no reason why OOR cannot decide the legal issue presented based on those undisputed facts." (*Pennsylvania Game Commission v. Carla Fennell*, No. 104 C.D. 2015, Pennsylvania Commonwealth Court, Oct. 26)

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Washington

A court of appeals has ruled that Steve Vermillion, a Puyallup city council member, must search his personal email account for records concerning public business and that his personal email account is not subject to any constitutional privacy protection. Vermillion had maintained a website concerning his political activities. Once he was elected to the Puyallup city council, he continued to use the website to receive email from constituents. Arthur West requested any records pertaining to public business maintained on Vermillion's personal account. The city denied the request and West sued. The trial court ruled that the city was obligated to search for responsive records. The city and Vermillion appealed. Before the case was decided, the Washington Supreme Court ruled in *Nissen v. Pierce County*, 357 P.3d 45 (2015), that text messages on a personal cell phone used for public business were subject to the Public Records Act. Here, the appeals court found *Nissen* settled the issue. The court noted that "*Nissen* squarely addressed this argument and held that an agency's employees or agents must search their own 'files, devices, and accounts,' and produce any public records, including 'emails,' to the employer agency that are responsive to the PRA request. The *Nissen* court also held that affidavits by the agency employees, submitted in good faith, are sufficient to satisfy the agency's burden to show it conducted an adequate search for records." The court pointed out that *Nissen* also rejected any constitutional protections for such records. Because the trial court had ruled before *Nissen* was decided, the court told the trial court to reconsider the case in light of *Nissen*'s requirements. (*Arthur West v. Steve Vermillion, City of Puyallup*, No. 48601-6-II, Washington Court of Appeals, Division 2, Nov. 8)

The Federal Courts…

Judge Richard Leon has ruled that the Department of State properly invoked **Exemption 3 (other statutes), Exemption 5 (privileges)**, and **Exemption 6 (invasion of privacy)** for redactions made in records concerning the agency's December 2010 decision to settle with BAE Systems. After reviewing the withheld records *in camera*, Leon noted that "State produced all reasonably segregable information contained in the same documents that was not subject to a statutory exemption and that no further non-exempt material is subject to release in the sample documents." State had also withheld records under **Exemption 4 (confidential information)**. Leon agreed with the agency that the records had been voluntarily submitted by BAE Systems. As such, he pointed out, "the State Department lacked the authority to compel their production, and. . .the submitted documents are therefore subject to the 'voluntary' standard set forth in *Critical Mass*." He added that "the withheld information meets that standard since it 'is of a kind that would customarily not be released to the public' by BAES, and is therefore appropriately withheld." He went on to observe that "nevertheless, even if the documents at issue were provided to State involuntarily, the withheld information would still meet the higher standard set forth in *National Parks* as disclosure of the withheld documents at issue would either hinder the government's ability to obtain similar information in future settlement negotiations or 'would likely cause substantial competitive harm to BAES." (*Associated Press v. U.S. Department of State and BAE Systems, Inc.*, Civil Action No. 15-345 (RJL), U.S. District Court for the District of Columbia, Nov. 1)

A federal court in California has ruled that the although the Department of the Navy has not yet shown that it conducted an **adequate search** for records of a sexual harassment complaint requested by Dennis Buckovetz, who was not a party to the complaint, but that it has shown that it properly redacted 18 pages under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The Navy originally denied Buckovetz's request by claiming the complaint was

protected by **Exemption 5 (attorney-client privilege)**. However, after Buckovetz filed suit, the Navy disclosed 18 pages with redactions under Exemption 6 and Exemption 7(C). Buckovetz challenged the adequacy of the search. The agency had routed the request to two separate human resources offices at the Marine Corps Recruiting Depot. The request was also sent to the Human Resources Office at Camp Pendleton. Assessing the adequacy of the search, the court noted that "here, while it appears that [the agency] searched the three offices most likely to have records, [its] declaration fails to explain adequately how those searches were conducted. Rather, the declaration asserts in a conclusory manner that the [human resources offices] did not have responsive records. If [a second individual] conducted a search, the declaration provides no information about what records were searched and what processes were utilized." The court pointed out that "on the basis of [its] insufficient declaration, the Court cannot find whether the search method was reasonably calculated to uncover all relevant documents. The Court orders Defendant to submit a supplemental declaration regarding the adequacy of its search that cures the deficiencies noted above." Upholding the privacy exemption claims, the court observed that "the documents at issue relate to an investigation of a sexual harassment complaint. Defendant redacted the names of the complainant, accused co-workers, witnesses, and government employees involved in the investigation, as well as substantive information that could reveal the individuals' identities. . .These individuals have a legitimate interest in keeping this information from public view." As to the public interest in disclosure, the court indicated that "Plaintiff has failed to demonstrate that disclosure would advance the public knowledge of government operations. . .Rather, Plaintiff's focus appears to be on his own personal interest in the documents. But, Plaintiff's personal reasons for wanting the information are not legally cognizable factors in determining the propriety of withholding the documents." (*Dennis M. Buckovetz v. U.S. Department of the Navy*, Civil Action No. 15-00838-BEN-MDD, U.S. District Court for the Southern District of California, Nov. 4)

Judge Colleen Kollar-Kotelly has ruled that Freedom Watch has not shown that its FOIA requests concerning the 2014 confrontation in Clark County, Nevada between Bureau of Land Management agents and supporters of Cliven Bundy were received by the Bureau Land Management, the Department of Justice, or the FBI. Freedom Watch claimed it faxed its requests to the three agencies, but after Freedom Watch filed suit, the agencies indicated that none of them had a record of receiving the requests. Kollar-Kotelly noted that "as a matter of law, however, the sending of a FOIA request is not the salient action that initiates a request and imposes obligations on the agencies from which documents are being requested. Rather, the *receipt* of a request by the agency is the legally significant event that triggers the commencement of the FOIA request and that enables a requester, such as Plaintiff, who is dissatisfied with the agency response, to seek recourse from federal courts. Federal court jurisdiction over a FOIA claim is dependent upon a showing that an agency improperly withheld records." Both FBI and BLM provided declarations explaining their procedures for receiving requests and indicating that neither agency had received Freedom Watch's request. Freedom Watch suggested the agencies were lying because of the political controversy involved. Kollar-Kotelly observed that "plaintiff's conjecture, however, is inadequate to overcome the presumption of good faith that is afforded to agency affidavits and declarations." Further, she pointed out, the FBI had begun to process Freedom Watch's request once it learned of its existence as part of Freedom Watch's complaint. She observed that "the responsiveness of Defendant FBI in processing the May FOIA Request, even when received in this unusual form as an attachment to the Complaint in this action, offers further support of the FBI's good faith in this matter. It has not sought to evade Plaintiff's request, but rather responded according to its standard intake procedures upon receiving the request." Dismissing the suit, Kollar-Kotelly indicated that "because Defendants did not yet have an obligation to search for responsive records, any challenge to the adequacy of Defendants' search for responsive records is premature." (*Freedom Watch v. Bureau of Land Management, et al.*, Civil Action No. 16-992 (CKK), U.S. District Court for the District of Columbia, Oct. 27)

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Judge Colleen Kollar-Kotelly has ruled that Rene Morales is not entitled to a **preliminary injunction** requiring the Department of State and the Department of Homeland Security to immediately process a FOIA request submitted by Rene Morales and Estela Villa Linares for records concerning Linares' visa application because the plaintiffs have not shown a likelihood of success. Morales and Linares were married, but living apart because Linares had been unable to obtain a visa to enter the United States from Mexico. The two submitted a FOIA request to State and U.S. Citizenship and Immigration Services for records concerning Linares' visa application. Noting that Morales and Linares had not asked for expedited processing when they submitted their FOIA request, Kollar-Kotelly observed that "Plaintiffs argue that they will suffer irreparable harm in the absence of injunctive relief because they will be denied the opportunity to live together as a married couple. But by Plaintiffs' own calculation, they have already suffered this injury for approximately seven years. Moreover, there is no clear causal connection between Plaintiffs' obtaining Linares' immigration records and Linares being allowed to enter the United States. Plaintiffs may be arguing that once they have Linares' papers, they could mount an effective challenge to the decision to deny her a visa, but they fall far short of demonstrating that this outcome is 'certain,' as opposed to 'theoretical.' Moreover, as Plaintiffs concede, they did not ask for expedited processing of their FOIA request from the agencies at issue. Plaintiffs' characterization of their request in this case as an 'emergency' is accordingly placed in doubt." Finding the plaintiffs had not shown a likelihood of success, Kollar-Kotelly pointed out that "Plaintiffs are in effect asking that the Government expend resources to quickly process *their* personal records for personal reasons, before processing the records of other requesters. Granting the type of request made by Plaintiffs would harm others waiting for their FOIA requests to be processed, and would erode the proper functioning of the FOIA system." (*Rene Morales, et al. v. Secretary, U.S. Department of State, et al.*, Civil Action No. 16-1333 (CKK), U.S. District Court for the District of Columbia, Oct. 27)