Volume 43, Number 22
November 8, 2017

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: After the State Department was criticized on Fox News for failing to finish its processing of former Secretary of State Hillary Clinton's emails, President Trump ordered Secretary of State Rex Tillerson to take steps to clear up State's backlog of 13,000 FOIA requests by the end of December. In an October 31 memo to staff, Tillerson indicated that some agency staffers would be reassigned to work on completing the remaining backlog of requests. Nahal Toosi of POLITICO found that many State Department employees affected by the change thought the push was more political than substantive. One employee told Toosi that "it's a remarkable misuse of resources to advance what is at its core a partisan political aim." But Moira Whelan, who served as a deputy assistant secretary under John Kerry, told Toosi that "if more right-wing groups are FOIA-ing than left-wing groups, that is what it is – it's FOIA, it's a system for everyone. It doesn't matter what the motivation is. Any secretary should try to make it a priority." Steve Aftergood of Secrecy News noted that "there has been no comparable involvement by an agency head like Secretary Tillerson in the FOIA process lately." But, Aftergood added, "the backlog at State is particularly large, driven in part by a focus on former Secretary Clinton and her tenure at the department.". . . Cause of Action Institute and the Sunlight Foundation have submitted a petition to OMB asking agencies to finalize the "Release to One, Release to All" rule that began during the Obama administration. In a statement explaining its action, Alex Howard of the Sunlight Foundation noted that "our petition compels the Trump administration to either move forward with disclosure and implementation, or explain why they don't believe the policy is workable."

Court Upholds DOJ's Exemption Claims On Records Referred to Other Agencies

Judge Kejanti Brown Jackson has upheld the remaining claims made by the Justice Department that a handful of records pertaining to the use of pen register and trap-and-trace devices for surveillance – including materials from Westlaw – were properly withheld under Exemption 1 (national security) and Exemption 3 (other statutes). The case raises some interesting questions, not only how a publicly-available

non-government legal document could be classifiable, but also the extent to which agencies that receive FOIA requests are responsible for the referral decisions and claims made during the processing of a request.

EPIC's original request was sent to the National Security Division at the Department of Justice for records concerning the government's prior surreptitious use of pen registers and trap and trace devices under the Foreign Intelligence Surveillance Act. After the agency failed to respond within the statutory deadline, EPIC filed suit. NSD referred some records to the FBI and the National Security Agency for review and withholding determinations. The agency submitted a *Vaughn* index with 92 entries that included affidavits from the NSD, the FBI, and the NSA, invoking Exemption 1, Exemption 3, Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), and Exemption 7(E) (investigative methods and techniques). By the time Jackson ruled, only two issues remained – (1)whether the government properly withheld Westlaw printouts that were part of a classified legal belief that had been submitted to the Foreign Intelligence Surveillance Court, and (2) whether the government properly redacted from Semi-Annual Reports that DOJ made to Congress information regarding the use of pen registers and trap and trace devices, consisting of summaries of FISC legal opinions, descriptions of the scope of the FISC's jurisdiction, and discussions of FISA process improvements. EPIC challenged the agency's Exemption 1 and Exemption 3 claims.

After reviewing the remaining records *in camera*, Jackson upheld the government's claims. She pointed out that the agencies had relied on three separate statutes – Section 102A(i)(1) of the National Security Act of 1947, Section 6 of the National Security Agency Act of 1959, and 18 U.S.C. § 798 – to justify its claims under Exemption 3. EPIC did not contest that the three statutory provisions qualified as Exemption 3 statutes, but instead "seeks to advance the novel contention that, even though DOJ's NSD referred certain documents to the FBI and the NSA for exemption determinations under governing FOIA regulations, the government cannot assert certain otherwise applicable FOIA exemptions in the instant context because the FOIA request was directed to NSD in the first instance." Jackson found the exemption claims appropriate, noting that "given the context in which the [Westlaw] printouts exist in this litigation – *i.e.*, as part of a classified brief submitted to the FISC – the printouts also constitute intelligence sources and methods for purposes of Section 102A(i)(1), and therefore the FBI properly withheld those materials."

Jackson pointed out that "EPIC vigorously maintains that DOJ has not followed the right *procedure* for establishing the applicability of Exemption 3 with respect to the withholdings at issue," because even though NSD created and controlled the records, it had provided no declaration to justify the withholding. Further, it was unclear whether a non-Intelligence Community agency had the legal authority to assert Section 102A(i)(1). EPIC also claimed the agency had acted in bad faith by not asserting Exemption 3 during the earlier rounds of summary judgment briefings in the case.

Jackson addressed EPIC's bad faith argument first. Acknowledging that *Maydak v. Dept of Justice*, 218 F.3d 760 (D.C. Cir. 2000), and its progeny generally required agencies to make all their exemption claims at the beginning of litigation, Jackson explained that "the Court does not perceive the government as having acted in bad faith, nor does it view the government's filings as providing post-hoc rationalizations for the withholdings already made. Rather, the document-production process is a fluid one at the district-court level, and it often includes contemporaneous review and continuous production determinations made by agency-defendants. Thus, in this Court's view, the government is entitled to articulate fully all of the justifications for the withholdings that it makes prior to the Court's ruling on summary judgment."

Generally speaking, an agency that receives a FOIA request is responsible for the processing of that FOIA request, including any decision to withhold information. Agencies can consult with other agencies who may have a greater interest in certain responsive documents, but EPIC here questioned the NSD's authority to

delegate its FOIA responsibilities to the FBI and the NSA and allow those agencies to determine whether the records were exempt or not. Rejecting the challenge, Jackson noted that "the record clearly reveals that DOJ followed its *referral* process when it responded to EPIC's FOIA request, consistent with the agency's regulations." Those regulations instructed the agency to which the records were referred to take responsibility to respond directly to the requester. Jackson observed that "the undisputed evidence establishes that DOJ's NSD referred the SARs and Westlaw printouts to the FBI and the NSA pursuant to these regulations with the intent of having those other agencies determine whether any exemptions should be invoked. Courts in this district have long recognized the permissibility of such a referral and EPIC neither challenges the validity of DOJ's referral regulations nor cites any authority that limits the ability of an agency receiving the FOIA referral to invoke any otherwise-applicable FOIA exemption."

Jackson found the records were properly classified as well. She pointed out that "mindful of the deference it must afford to the government in this context, this Court finds that the government's explanation of the harm that might result from release of the Westlaw printouts, and how such a disclosure could reveal national security information that is not evident from looking at the documents in isolation, is reasonable and sufficient to support its invocation of Exemption 1. In this regard, the Court accepts the government's assertion that the Westlaw printouts and the main brief to which they are attached are rightfully construed as a single document, and that disclosure of the attachments would elucidate the substance of the main (undeniably classified) document, such that the government is entitled to withhold the attachments themselves." (*Electronic Privacy Information Center v. Department of Justice*, Civil Action No. 13-1961 (KBJ), U.S. District Court for the District of Columbia, Nov. 7)

Views from the States…

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

Pennsylvania

A split court of appeals panel has ruled that the trial court erred in finding that a publicly available property list for Butler County was exempt because of a supreme court order in another case prohibiting the disclosure of home address information for public school teachers because it was protected by the state's constitutional right of informational privacy. Even though Butler County admitted that employer information could not be discerned from its property list, the trial court decided the supreme court's order applied anyway. Pennsylvanians for Union Reform joined by state media organizations appealed to the court of appeals. By a 2-1 vote, the panel ruled that the public nature of property lists militated against finding that they were protected by the judicial order. The majority noted that the supreme court's ruling 'does not require a longstanding public record like the Property List to be subjected to a balancing test. Addresses contained in the Property List are fundamentally different from the public school employees' home addresses at issue in the [supreme court's ruling]. In a request for a home address of a specified individual or group of individuals, the address becomes a personal identifier, and a means of disturbing an individual in his own home. Although a request for a home address that is tied to an individual implicates a judicial balancing test, a request for the Property List does not." (*Pennsylvanians for Union Reform v. Butler Area School District*, No. 1460 C.D. 2014, Pennsylvania Commonwealth Court, Nov. 2)

ACCESS REPORTS

A court of appeals has ruled that the Office of Open Records did not have sufficient evidence to dismiss a complaint filed by prisoner Alton Brown against the Office of Inspector General as to whether the OIG investigated complaints received by prisoners. Brown asked the OIG for records concerning the agency's policy for investigating prisoner complaints. Because he had unsuccessfully asked for complaint information on two prior occasions, OIG denied his request, claiming complaint records were protected by the noncriminal investigations exemption and because Brown's two previous requests constituted an undue burden on the agency. Brown complained to OOR, which upheld OIG's denial. The appellate court, however, found that OIG and OOR had misinterpreted the meaning of *Stein v. Plymouth Township*, 914 A.2d 1179 (Penn 2010), which both agencies had cited for the principle that identities of complainants filing noncriminal complaints were exempt because the complaints themselves were entirely exempt. The appeals court pointed out that subsequent decisions had modified *Stein* so that it applied only when a complaint had been investigated. The court observed that "OOR addressed neither Brown's argument nor his evidence. It has made no findings about whether the Inspector General actually investigates inmate complaints." The court further found that OIG's affidavits contradicted each other on the issue of whether prisoner complaints existed or not. The court sent the case back for further proceedings. (*Alton D. Brown v. Office of Inspector General*, No. 730 C.D. 2016, Pennsylvania Commonwealth Court, Oct. 27)

The Federal Courts…

Judge Beryl Howell has ruled that the State Department properly withheld information that could identify nine classified international agreements under **Exemption 1 (national security)**. The Brennan Center for Justice requested a list of unpublished international executive agreements transmitted to Congress pursuant to the Case-Zablocki Act. The Case-Zablocki Act requires the State Department to annually provide Congress a list of non-treaty international agreements that have not been published because of national security concerns. The Brennan Center requested these lists since 1990, but eventually narrowed its request to nine documents identifying international agreements between 2004 and 2013. The index listed each agreement alphabetically by country, and further identified them by date, title, and summary. The State Department claimed the information was protected under Exemption 1. Characterizing the agency's claims as relying on a mosaic theory that was "not logical," "convoluted and wholly speculative," the Brennan Center argued that the information did not reach the level of harm required for classification. Finding the agency had provided sufficient support for its classification claims, Howell noted that "an analyst for a foreign government could use the information contained in each entry reflecting an agreement's 'title,' 'entry in force,' 'summary,' and 'expiration' to determine which nations have concluded existence-classified agreements with the United States, even if those nations' identities were redacted. Moreover, because the documents at issue list international agreements alphabetically by nation, redacting information relating only to existence-classified agreements would not suffice to protect the classified information, as an analyst could discern at least some of the nations with which the United States has concluded existence-classified agreements by seeing where within the alphabetical list the redacted information appears. Even where alphabetization leaves ambiguity as to the nation with which the United States has concluded an existence-classified agreement, the analyst could combine the information the plaintiff seeks with other publicly-available information to identify the nations with which the United States has existence-classified agreements." Howell added that "producing only each agreement's classification-level notation would not suffice to protected classified information, because any such notations defendant could produce would be listed alphabetically by nation, even if the nations' identities were redacted." The Brennan Center argued the agency could **segregate** the information in such a way as to mask its identity. But Howell disagreed, pointing out that "identification of nations with which the United States might potentially have concluded an existence-based agreement is not the only danger to the national security that production, in whole or part, of the documents at issue may cause." She observed that "such

agreements are existence-classified in part because classification allows the United States to maintain military and intelligence relationships with nations whose populace or neighbors might not favor such cooperation." (*Brennan Center for Justice v. Department of State*, Civil Action No. 15-2200 (BAH), U.S. District Court for the District of Columbia, Nov. 6)

A federal court in New York has ruled that the FBI properly claimed **Exemption 7(A) (interference with ongoing investigation or proceeding), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 1 (national security)** for the remaining redactions made in Form 302s prepared as the result of its 18 interviews with Umar Farouk Abdulmutallab, who attempted to detonate a bomb concealed in his underwear during a flight from Amsterdam to Detroit in 2009. Abdulmutallab was sentenced to life in prison. In connection with Abdulmutallab's sentencing, the FBI provided Simon Perry, a professor of criminology at Hebrew University, with redacted copies of the 302s to allow him to prepare a 22-page report on the likelihood that Abdulmutallab would again attempt a martyrdom mission if released from prison. Perry's report was made public. *New York Times* reporter Scott Shane requested the 302s referenced in Perry's report. The FBI initially claimed the 302s were protected by Exemption 7(A). Shane appealed that decision to the Office of Information Policy, which remanded Shane's request for further processing. However, OIP subsequently upheld the FBI's claims under Exemptions 7(A), 7(C), and 1. Shane filed suit and the agency disclosed 45 heavily redacted pages. Judge Ronnie Abrams then held an *in camera* review, resulting in disclosure of 188 pages out of a total of 195 pages. This time, Abrams agreed with the FBI that its remaining redactions were appropriate. He noted that "the FBI has shown that it is reasonable to expect that the disclosure of such a 'mosaic' would enable suspects to more easily evade investigation. Particularly in light of the deference owed to government officials on matters related to national security, the Court concludes that the FBI has carried its burden of showing that the production of the remaining portions of the 302s could reasonably be expected to interfere in pending and anticipated law enforcement proceedings." Abrams upheld the agency's Exemption 7(C) claims as well. The *Times* emphasized the degree of public interest in this case. While Abrams agreed that there was a significant public interest, he pointed out that "here, however, the disclosure of the specific names or other identifying information of third parties mentioned in the withheld records would do little, if anything, to shed light on these activities." The *Times* claimed the Perry report and other public comments by President Barack Obama and Attorney General Eric Holder constituted a waiver of the exemptions as to the material in the 302s. However, Abrams indicated that he could not "conclude, that the information that remains withheld 'matches' or that it 'substantially overlaps' with the information that the government has publicly disclosed while 'add[ing] nothing to the risk.'" Abrams praised the determination of the *Times* in pursuing the litigation, noting that "the Times has demonstrated a tireless commitment to maximizing access to information that is, without doubt, of substantial public interest." (*New York Times Company and Scott Shane v. Federal Bureau of Investigation*, Civil Action No. 15-4829 (RA), U.S. District Court for the Southern District of New York, Nov. 7)

The D.C. Circuit has ruled that the Department of Justice properly withheld a 30-page termination letter of an Assistant U.S. Attorney under **Exemption 6 (invasion of privacy)**. Howard Bloomgarden, who had been convicted in the Eastern District of New York and was subsequently convicted of two murders in California state court, requested records about the termination of the AUSA, who had been involved in the prosecution of Bloomgarden's case in New York. DOJ ultimately disclosed 3,000 pages of attachments, as well as two draft letters, but refused to disclose the termination letter itself. Bloomgarden sued in district court and Judge Ellen Segal Huvelle found that the AUSA's privacy interest outweighed the minimal public interest in disclosure of a termination letter pertaining to a single AUSA. At the D.C. Circuit, Bloomgarden argued that AUSAs played a uniquely powerful role and that the size of the file suggested the AUSA had played a far

ACCESS REPORTS

more crucial role in prosecuting Bloomgarden. Writing for the court, Senior Circuit Court Judge Laurence Silberman pointed out that "even assuming *arguendo* Appellant is correct that Justice Department prosecutors are particularly powerful governmental lawyers, and that the public interest in how they are restrained is therefore significant, our examination of the letter *in camera* reveals only alleged unprofessionalism of a sort in which any junior attorney might engage, not allegations of prosecutorial misconduct or other abuse of a federal prosecutor's powers." Silberman observed that "the aspect of the letter that concerns us the most is that it contains mere allegations; it was never tested, nor was it ever formally adopted by the deputy-attorney general's office." Bloomgarden also argued that the AUSA had placed the letter into the public domain by pursuing an appeal to the Merit Systems Protection Board. But Silberman rejected the claim, noting that "there are some hints in the records that the Assistant may have, once again, filed a notice of appeal with the MSPB – but nothing indicates that such an appeal was pursued, nor is there any record of the letter or any material referring to the letter that was made public." Bloomgarden contended that because DOJ had disclosed so many records he had substantially prevailed to qualify his attorneys for an **award of attorney's fees.** Silberman found the claim was premature at the appellate level. He pointed out that "since the issue of costs is not yet before us, we do not wish to speculate as to whether they may ultimately be granted or denied." (*Howard Bloomgarden v. United States Department of Justice*, No. 16-5263, U.S. Court of Appeals for the District of Columbia Circuit, Oct. 31)

Judge Amy Berman Jackson has ruled that the FBI conducted an **adequate search** and properly redacted information from records in response to FOIA requests from Marcelo Sandoval, but that EOUSA and Central District of Illinois have not yet sufficiently explained its search. Sandoval, a federal prisoner, made a number of requests to various components of the Department of Justice for records about himself, particularly those reflecting whether he was considered both a member of the Mexican mafia and a confidential informant. He gave a case number from the Central District of Illinois to EOUSA for search purposes. Sandoval made two FOIA requests to the FBI, the second of which added information about a kidnapping charge. The FBI initially told Sandoval that it found no records, but after he filed suit the FBI located 11 pages and released five pages in full or in part. Sandoval argued that none of the agencies considered amending his records under the **Privacy Act**. Although Jackson found Sandoval had failed to exhaust his administrative remedies because he never requested a Privacy Act amendment, she expressed puzzlement over the agencies' argument, noting that "defendant seems to be arguing that if an agency did not locate any responsive records to the FOIPA request, there could not be any 'inaccurate records' to correct under the Privacy Act, and therefore, the complaint fails to state a claim under the Privacy Act. But plaintiff's FOIA claim is distinct from his Privacy Act claim, and the production of responsive records under FOIA does not necessarily mean that the same documents would be responsive to a request to correct records under the Privacy Act." Jackson faulted the explanation of the searches done by EOUSA and the Central District of Illinois. She noted that 'because the EOUSA and USAO CDIL declarations lack the necessary specificity and clarity, the Court finds that summary judgment is inappropriate at this time." As to the FBI, because it had located some records, she concluded its search was sufficient and that its redactions made under **Exemption 7 (law enforcement records)** were appropriate. (*Marcelo Sandoval v. U.S. Department of Justice*, Civil Action No. 16-1013 (ABJ), U.S. District Court for the District of Columbia, Nov. 2)

Judge Randolph Moss has dismissed Judicial Watch's suit against the State Department pertaining to former Secretary of State Hillary Clinton's use of a non-government email account after finding that the agency was willing to withdraw two previous redactions it had made in an email exchange between Clinton and former CIA Director David Petraeus. Moss explained that "on October 20, 2017, the Department of State determined that it could release the requested records to Judicial Watch without the challenged redactions. It did so, and Judicial Watch has verified that the remaining issues in this case are now moot." (*Judicial Watch,*

Inc. v. U.S. Department of State, Civil Action No. 15-689 (RDM), U.S. District Court for the District of Columbia, Nov. 3)

A federal court in Illinois has ruled that Raymond Hughes has **failed to state a claim** to support his suit against the Department of Justice for records showing that is brother has a criminal record. Hughes filed suit seeking the criminal record of Andrew Hughes aka Andrew Darian, who had been appointed the personal representative of a family estate. Raymond alleged that Andrew had a criminal record in Florida, which should have been considered before appointing him personal representative. The agency argued that Hughes had not made a FOIA request and, thus, he was not entitled to relief. Hughes argued that he had been advised by DOJ to file a complaint in federal court to obtain the records. Dismissing the suit, the court noted that "it remains that Plaintiff has alleged no facts in his amended complaint supporting an inference that he made a FOIA request in the first instance, and he does not allege DOJ failed to provide him with requested documents for an improper reason." (*Raymond Hughes v. United States Department of Justice*, Civil Action No. 17-5429, U.S. District Court for the Northern District of Illinois, Nov. 6)

# #