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Editor/Publisher:
Harry A. Hammitt
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1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

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Washington Focus: Steve Aftergood, the editor of Secrecy News, has a timely rumination on the distinctions in meaning between open government and the more euphemistic concept of transparency, which frequently serves as a not particularly useful catch-phrase that contains many of the admired aspects encompassed in the concept of open government while also suggesting a disdain for elements of responsible secrecy that need to be protected in order to strike a balance between knowing too little and knowing too much. Aftergood begins by noting that "it is usually taken for granted that transparency is a prerequisite to good government. The idea seems obvious." But, he notes, "in practice that is not always true. Demands for transparency can sometimes be used to undermine the values of an open society. . ." Referring to an upcoming article by Columbia University Law School Professor David Pozen, Aftergood quotes Pozen as noting that "transparency is not, in itself, a coherent normative ideal." Pozen suggests that "less romanticism and more realism" about the topic is needed.

D.C. Circuit Rejects IRS Non-Database Claim

The D.C. Circuit has shown considerable skepticism of the IRS's claim that its Asset Forfeiture Tracking and Retrieval System (AFTRAK) is not a database because it is not searchable. The Institute for Justice requested records about asset forfeitures, focusing particularly on AFTRAK, a database referred to in several agency manuals. After the Institute filed suit, the agency disclosed what it characterized as the most comprehensive standard report available from the AFTRAK system entitled the Open/Closed Asset Report. That report contained redactions under Exemption 7(A) (ongoing investigation or proceeding) as well as Exemption 6 (invasion of privacy), Exemption 7 (C) (invasion of privacy concerning law enforcement records), and Exemption 7(F) (harm to a person). After the Institute for Justice filed suit, the agency claimed that AFTRAK was not a database at all, but instead, was a web-based application that aggregated information from various sources within the agency into a single user interface.

ACCESS REPORTS

The district court decided not to address the issue of whether AFTRAK qualified as a database and instead accepted the agency's redacted Open/Closed Asset Report as responsive to the Institute's request. The district court upheld all of the agency's exemption claims. The Institute then appealed to the D.C. Circuit. At the appellate level, Senior Circuit Court Judge Stephen Williams rejected the premise on which the agency had built its legal argument. He noted that "we are not convinced beyond a material doubt that the Open/Closed Report contains all AFTRAK records or that its delivery to the Institute could serve as a substitute for the search required by FOIA." Finding the agency's explanations wanting, Williams indicated that "we follow the parties' and the district court's lead in using 'database' – a term that has no independent legal significance under FOIA – to mean a system that stores or contains records subject to FOIA. Absent further evidence to the contrary, it seems safe to say that if AFTRAK is a database, the Institute is entitled to more than has been delivered, possibly much more. And even if it should prove that AFTRAK isn't a database, we have no showing at all why AFTRAK's (as yet undisclosed) non-database characteristics in any way imply that a search for records 'contained in' it would not yield material more closely approximating the IRS's expansive descriptions of AFTRAK in the IRS Manual and other publications than does the Open/Closed Report."

Williams noted that "in sum, the IRS's declaration, on its own terms, does not contain the 'reasonable specificity of detail' necessary to sustain summary judgment and, worse, its claims have been 'called into question by contradictory evidence on the record.' These discrepancies require explanation. Given the existing record, the district court erred in concluding that the IRS's production of the Open/Closed Report satisfied the IRS's ordinary obligation to search AFTRAK for 'all records.'"

To evaluate those issues, the D.C. Circuit remanded the case back to the district court. Williams indicated that "the district court will have to ascertain the nature of the AFTRAK system – i.e., whether and to what extent AFTRAK itself contains records and/or provides access to records stored elsewhere. To the extent that AFTRAK provides access to records stored elsewhere, the district court will need to 'ascertain the scope of the [Institute's] request,' specifically, whether it requests such records and then determine whether the IRS's search was adequate in light of that scope."

At the district court, the Institute had asserted that its request for records "contained in" AFTRAK should also be construed as "accessible by" AFTRAK, in case technical facts made the "accessible by" language more realistic. Ordering the district court to sort out the details, Williams explained that "we do not require technical precision in FOIA requests, and a request certainly should not fail where the agency knew or should have known what the requester was seeking all along. For example, a FOIA request for emails would not fail because the request for emails 'in' an Outlook inbox rather than 'accessible through' Outlook. Nor do we require a requester to know anything about where or how the agency stores those emails. Instead, the standard for a FOIA request is that it 'reasonably describes' the records sought." Williams indicated that "Congress added the 'reasonably describes' standard for a FOIA request in 1974, replacing the requirement that a request name 'identifiable records.'" He observed that "here, the IRS's narrow interpretation would be lawful only if the agency were truly not 'able to determine "precisely what records [were] being requested."'"

Turning to whether or not AFTRAK qualified as a database, Williams noted that the Institute had the better of the argument. He pointed out that "the IRS gives the court [no] reason to infer that there's any inherent conflict in classifying the AFTRAK 'system' as both a 'web-based application' and a database. Given that the IRS's legal argument turns on AFTRAK's not being a database, the failure of the IRS's sole declaration even to assert (much less explain or justify) mutual exclusivity between the two is bewildering." By contrast, Williams pointed out that the Institute had presented three separate documents referring to AFTRAK as a database. The Institute also provided evidence that relevant employees could enter information about seized assets into AFTRAK. Williams wondered "if a person can 'enter' information into AFTRAK, why can't the information so entered be 'reasonably described' as a record 'contained in' it?"

The D.C. Circuit rejected the IRS's broad use of Exemption 7(A) to withhold entire columns of data on investigations. Williams noted that "we conclude that the IRS failed to tailor the categories of information withheld to what Exemption 7(A) protects: law enforcement records that 'could reasonably be expected to interfere with enforcement proceedings.' In so doing, the agency does not appear to have accounted for its 'obligation to disclose any reasonably segregable portion of a record' after removing the exempt material." Continuing, Williams pointed out that "the invocation of Exemption 7(A to redact *all rows* relating to open investigations using the justification that 'disclosure of any information concerning an open criminal investigation could reasonably be expected to compromise or interfere with ongoing law enforcement' is insufficient on the facts of this case. In its declaration, the IRS does not even mention 14 of the 22 columns, much less explain why disclosure of such columns as, for example, the 'Primary Seizure Statute' of the "Seizure Type' (civil, administrative, or criminal) could possibly harm ongoing investigations."

The D.C. Circuit also faulted the district court for finding that the Institute had forfeited its right to challenge the agency's ultimate claim under Exemption 7(F). Williams noted that it was not until the agency's Exemption 6 and 7(C) claims were rejected that the substance of what the agency was claiming under Exemption 7(F) became apparent. Williams explained that "the fact that the Institute did not object to the IRS's use of Exemption 7(F) to withhold a 'target's street address'—the only information the IRS previously claimed a right to withhold from the Asset Description column under Exemption 7(F) – does not mean that the Institute forfeited the right to object to the agency's actual – and evidently far broader – use of Exemption 7(F)." (*Institute for Justice v. Internal Revenue Service*, Civil Action No. 28-5316, U.S. Court of Appeals for the District of Columbia Circuit, Nov. 1)

Views from the States

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

Kentucky

A court of appeals has ruled that the waiver given by the federal Department of Health and Human Services to Kentucky to revise its Medicaid program to include work requirements constituted a final decision rather than a preliminary draft. Anne Marie Regan, an attorney at the Kentucky Equal Justice Center, submitted an Open Records Act request for records related to the application and its approval to the Cabinet for Health and Family Services. The Cabinet responded to Regan's request by indicating that any records in its possession would be considered preliminary because they did not represent any final action on the part of the Cabinet. Regan then filed a complaint with the Attorney General's Office. The Cabinet provided five pages of emails as a sample but declined the AG's request to provide records for *in camera* review, arguing that would constitute a waiver of confidentiality. As a result, the AG issued an opinion finding the Cabinet had failed to show that the records were exempt. Five months later, the federal HHS approved Kentucky's application, which constituted the final action on Kentucky's waiver request. The Cabinet filed suit challenging the AG's opinion, arguing that its own preliminary records remained privileged unless both adopted and made part of a final administrative action by the Cabinet. Regan argued that HHS's waiver constituted the final agency decision on the matter. The trial court agreed with Regan. The trial court also ruled that the
Cabinet had violated the Open Records Act by failing to submit documents to the AG for *in camera* review.

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The Cabinet then filed an appeal. The court of appeals noted that its recent decision in *University of Kentucky v. Lexington H-L Services*, 579 S.W. 3d 858 (Ky. App. 2018), specifically addressed the issue of incorporation and rejected it, noting instead that "preliminary records lose exempt status if such records formed the 'basis' of the agency's final action." Applying that decision here, the appeals court indicated that "likewise, in this case, the preliminary records need not be referenced in or incorporated into the HEALTH Waiver Application to lose exempt status. The preliminary records need only form a basis for the HEALTH Waiver Application." The appeals court also rejected the Cabinet's claim that it did not have to provide records to the Attorney General for *in camera* inspection. Instead, the appeals court noted that "any subversion of this authority inherently undermines the functioning of the Attorney General's Office, and it inhibits transparency in government operations." (*Cabinet for Health and Family Services v. Anne Marie Regan*, No. 2018-CA-000842-MR, Kentucky Court of Appeals, Nov. 8)

Missouri

A court of appeals has ruled that an FBI report into the murder of Missouri State Highway Patrol Cpl. Bob Harper at his home in 1994 is not protected by Exemption 7(A) (interference with ongoing investigation or proceeding) of the federal FOIA since it was attached to the file of a separate investigation by the Missouri State Police into the murder. Harper's murder was never solved, and the investigation was closed. In 2015, Harper's daughter Kimberly, and his widow, Sharon Kay Harper, requested the file from the Missouri State Highway Patrol. At the time of Harper's murder, FBI policy allowed state agencies to attach the FBI's report to their own narratives of investigation. The MSHP file on Harper was created in 1996 and included the FBI report. However, in 2001, the FBI changed its policy, allowing state agencies to only reference the FBI report number in their own narratives. In denying the Harpers' request, the MSHP argued that the FBI record remained protected under Exemption 7(A) of the federal FOIA, and, further, that the FBI record was not a state record for purposes of the Missouri Sunshine Law. The trial court agreed with the MSHP, concluding that the federal FOIA preempted the state law by protecting the federal records. The court of appeals first noted that "to determine whether state law is preempted by a federal statute, we examine the text and structure of the federal statute." Doing so, the appeals court concluded that "since FOIA's enforcement provision refers only to 'agency records,' it is clear that the disclosure obligations. . .were intended to apply only to federal agencies. Congress did not set forth a clear and manifest purpose to supersede state laws traditionally governing the public records of state agencies." The appeals court pointed out that "the copy of the attached FBI report was created by the FBI and has come into the agency's possession in the legitimate conduct of its official duties. . .There is no dispute these records were retained by the MSHP and requested under the Sunshine Law. FOIA does not preempt the Sunshine Law and to construe FOIA to embrace state agency retained records, requested under state law, would be to extend the reach of FOIA beyond what we believe Congress intended. We find that the records at issue are not 'agency records' for the purposes of FOIA." The appeals court rejected the agency's argument that the FBI intended to retain control over the records and provided access to MSHP only for purposes of analysis. Instead, the appeals court observed that "in the present case, the MSHP did not merely receive the FBI report for the purposes of data processing. . . [Instead], the FBI surrendered its control of the FBI reports and the MSHP retained it." As a result, the appeals court indicated that "we conclude that the records at issue are retained by the MSHP and are public records subject to the Sunshine Law." (*Kimberley and Sharon Kay Harper v. Missouri State Highway Patrol*, No. WD 82465, Missouri Court of Appeals, Western District, Nov. 5)

Pennsylvania

The supreme court has ruled that records showing the receipt of funds donated to the City of Harrisburg's Protect Harrisburg Legal Defense Fund, used to defray legal costs associated with defending challenges to local firearms ordinances, constitute non-exempt financial records, a term of art that appeared in the original

Right to Know Act and was embodied in a separate exception in the overhauled Right to Know Law. As a result, although both the trial court and the court of appeals had found the donors' list was not a financial record and that names and addresses of donors could be redacted, the supreme court reversed, recognizing, however, that because the constitutional right of privacy might apply donors should be notified to allow them to attempt to block disclosure. The supreme court explained that "under the RTKA, a 'public record' was defined, in pertinent part, as 'any account, voucher or contract dealing with the receipt or disbursement of funds by any agency. . .' We presume, therefore, that the General Assembly intended the same language in the RTKL, albeit situated now within the definition of 'financial record,' to have the same meaning we gave it under the RTKA." After reviewing its past interpretations under the prior RTKA, as well as a handful of cases since it was replaced by the RTKL, the supreme court observed that "we will continue to construe the 'account, voucher, or contract' category broadly under the RTKL to effectuate expanded access to information about the activities of government. Thus, we need not settle on a single definition of 'account.' Rather, we conclude that the term has multiple acceptable definitions, including 'a list or enumeration of financial transactions' and a 'record of debit and credit entries, as well as monetary receipts and disbursements.'" Applying this broad interpretation of financial records to the disputed list, the supreme court pointed out that "to satisfy the statutory definition of financial record, the donor spreadsheet need only bear a close connection to an account. We find that it does. The donor spreadsheet reflects a list of monetary receipts, i.e., donations, to the City." The supreme court indicated that "based on our conclusion that the donor spreadsheet is a financial record as defined in section 102, we hold that the donor exception does not apply to it." However, the supreme court recognized that the constitutional right of privacy might apply to donors on the list, noting that "the record in this case indicates that the donors themselves were never notified about their right to object to disclosure of their names and addresses. Before the City can perform the required balancing test, the donors must be afforded notice and an opportunity to be heard." (*City of Harrisburg v. Joshua Prince*, No. 62 MAP 2018, Pennsylvania Supreme Court, Nov. 12)

The Federal Courts…

Judge Rudolph Contreras has ruled that the CIA may not issue a *Glomar* response neither confirming nor denying the existence of records in response to Buzzfeed reporter Jason Leopold's request for records concerning payments to Syrian rebels, finding it neither logical nor plausible that the agency did not have records responsive to Leopold's request. In so ruling, Contreras made clear that while Leopold's previous litigation involving his original request asking for records on CIA payments to Syrian rebels mentioned in a tweet by President Donald Trump was specific enough to allow the agency to issue a *Glomar* response, once Leopold resubmitted and broadened his request, he had met the threshold prohibiting the agency from plausibly denying the existence of records. Contreras pointed out that "with the question broadened in this way, it is now implausible for the CIA to claim that it cannot say one way or another whether it has any records concerning these payments. Undoubtedly, wherever the payments were coming from, the CIA must have some intelligence awareness of them." Leopold submitted his second series of requests while his original request asking for records on CIA payments was in litigation. His second request added several completely new sub-parts, but also broadened his original request for records on payments to delete any mention of CIA involvement with the payments and instead asked for "emails referring to payments to Syrian rebels fighting Assad" and simply "records authorizing payments." In response to Leopold's second multi-part request, the agency once again issued a *Glomar* response. To the extent that any daylight exists in the nuances of when *Glomar* responses are or are not appropriate, it stems from *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013), which held that because President Barack Obama, CIA Director John Brennan, and others had publicly acknowledged the U.S. involvement in targeted-drone strikes to kill alleged terrorists, the CIA no longer could

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plausibly claim that it had no intelligence interest in such drone strikes. While the weight of public acknowledgments made it impossible for the CIA to continue to pretend that it had no interest in such topics, the *ACLU v. CIA* decision did not go so far as to require intelligence agencies to confirm more specific aspects of such operations. Thus, in the earlier *Leopold* litigation, Contreras still could conclude that for the CIA to admit the existence of records pertaining to payments by the CIA to Syrian rebels could harm national security, once Leopold made his request more general, the agency's ability to make the same claim no longer was tenable. However, Leopold admitted that Trump's tweet provided the public acknowledgment that some form of payment existed. But Contreras pointed out that "despite the focus on the tweet, nothing about the tweet has changed since *Leopold I*. The only variable that has actually been manipulated is the wording of Buzzfeed's FOIA request." Contreras then observed that "it seems obvious enough that the changes in Buzzfeed's FOIA requests are intended to bring this case closer in line with *ACLU* than *Leopold I* was. Rather than focusing on the *CIA* payments that might not exist, Buzzfeed now seeks records concerning 'payments' in general. Based on the rule established in *ACLU*, this change to the request makes enough of a difference that Buzzfeed is entitled to more than a *Glomar* response." Contreras noted that "the Court agrees with Buzzfeed that there is no logical reading of the President's tweet in which the tweet does not acknowledge that the U.S. government had *some* knowledge of *some* payment to Syrian rebels. These payments may not have come from the CIA, and, as the Court observed in *Leopold I*, they may not even have necessarily come from the U.S. government." He added, however, that "at the absolute *least*, the tweet revealed that President Trump knew something about payments made by someone to Syrian rebels." Contreras pointed out that "the President's tweet officially acknowledged that the federal government had some sort of intelligence awareness of some type of payments. After that tweet – and likely before it as well – it seems wildly unlikely that, in the eight and a half years since the Syrian civil war began, the Central Intelligence Agency has done no intelligence-gathering that produced a single record even *pertaining to* payments Syrian rebels are receiving from *somewhere*, or a single record even *mentioning* or *referring to any program* to arm or train anti-Assad rebels. An across-the-board *Glomar* response is therefore not 'plausible' or 'logical.'" Contreras then observed that even if the CIA had to search for records, it was still likely that records would be exempt. But he concluded that "because the President's tweet make it implausible for any reasonable person to truly doubt the existence of at least *some* CIA records that are responsive to at least *some* of the nine categories of records that Buzzfeed requested, Buzzfeed has managed to overcome the Agency's *Glomar* response and the Agency has failed to meet its burden in this case." (*Jason Leopold and Buzzfeed, Inc. v. Central Intelligence Agency*, Civil Action No. 19-978 (RC), U.S. District Court for the District of Columbia, Nov. 7)

Judge Amit Mehta has ruled that the FBI properly responded to federal prisoner Anthony Roberson's three-part request for records and that he **failed to exhaust his administrative remedies**. After receiving Roberson's request, the FBI divided it into three separate requests. The first request asked for the genetic loci required to prove identity. Within three days, the FBI told Roberson the information was available on the agency's public website and provided a link. The second request asked for records on Charlie Scott, a third party. The agency issued a *Glomar* response neither confirming nor denying the existence of records and referred Roberson to sections of its website addressing requests for third-party information. The third request asked for a laboratory file. Within eight days, the FBI told Roberson it was considering his request for a fee waiver, and within 19 days, the agency disclosed 123 pages of previously processed documents without charge. All three responses included information on Roberson's right to appeal. Roberson admitted that he did not appeal any of the three responses but argued instead that the agency's processing of his requests constituted constructive exhaustion. Mehta pointed out that "in this case, Defendant has shown that it received Plaintiff's request on May 23, 2018. With respect to two categories of Plaintiff's requests, the FBI answered them on May 29, 2018, a mere three business days after receipt. As for the third category of Plaintiff's requests, the FBI answered them by producing 123 pages of records on June 20, 2018, 19 work days after

receipt. Thus, the agency's determination with respect to Plaintiff's requests all came not only within the 20-day timeframe but also the latest of the three issued five days before Plaintiff filed suit on June 25, 2018. Therefore, Plaintiff's constructive exhaustion argument is unfounded." (*Anthony Roberson v. Federal Bureau of Investigation*, Civil Action No. 18-1593 (APM), U.S. District Court for the District of Columbia, Nov. 12)

A federal court in Texas has ruled that the Department of Education properly responded to a request from Phyllis Darlene Stecz-Hunter for records on the consolidated promissory note for her student loans by providing her a copy of her Federal Direct Consolidated Loan and her loan history from the National Student Loan Database System. The court also found that Stecz-Hunter **failed to exhaust her administrative remedies** under both FOIA and the Privacy Act. Although the records disclosed to Stecz-Hunter indicated that the note itself did not contain the sub-total of her outstanding loans, Stecz-Hunter contacted a FOIA liaison at the agency, and was referred to Allied Interstate, the loan holder. When she contacted Allied Interstate, the company referred her back to the agency. She then asked the agency to either delete or correct her records but after hearing nothing further from the agency, she filed suit. Addressing her Privacy Act claims first, the court cited *Ivey v. Duncan*, 2014 WL 11256897 (D.D.C., Aug. 4, 2014), in which the district court found that Steven Ivey had failed to follow the Education Department's procedures for challenging a failure to correct or amend a Privacy Act record, as meaning that "only upon denial of that appeal may an individual then pursue judicial review of said denial. Hunter does not allege in her complaint or response that she exhausted her administrative remedies by appeals to the Secretary. Indeed, Hunter implicitly acknowledged in her response that she never filed a written appeal with the Secretary of Education, and she makes no allegation that she followed the U.S. Department of Education's appeals process under the Privacy Act. Because of her failure to appeal to the Secretary of Education, Hunter failed to exhaust her administrative remedies under the Privacy Act, and thus she cannot state a Privacy Act claim." Nevertheless, the court observed that Hunter was implicitly challenging the agency's failure to correct or amend her record when it did not respond to her request to correct or delete the information. Here, however, the court explained that "while Hunter was not satisfied with the note that was sent to her, DOE satisfied its duties under the Privacy Act by providing Hunter with a copy of her original promissory note. As Hunter has not shown that DOE failed to comply with the Privacy Act, [her allegation that the agency had failed to do so] does not prevent dismissal of Hunter's Privacy Act claims." Turning to the FOIA claim, the court dismissed it as well, noting that "Hunter contends that her promissory note is incomplete because it does not include two pages she previously filled out which contained a list of outstanding loans. However, the promissory note itself clearly states that the note will not contain a list of the amounts owed. Therefore, the Court finds that Hunter failed to carry her burden of stating a claim for which the Court can grant relief. (*Phyllis Darlene Stecz-Hunter v. United States Department of Education, et al.*, Civil Action No. 19-00142-P, U.S. District Court for the Northern District of Texas, Fort Worth Division, Nov. 13)

A federal court in Missouri has ruled that the Executive Office of U.S. Attorneys properly responded to John Hardimon's request for plea agreements included in three specific case numbers dating from 2010 and 2011. In response to Hardimon's request, EOUSA had the files retrieved from the Kansas City federal records center. After searching the files, the agency found only a single 2010 plea agreement which Hardimon already had. Hardimon argued that the agency failed to **conduct an adequate search**, insisting that other pleas agreements existed. The court noted that "even if the factual allegations provided by plaintiff proved that another plea agreement existed at one time, 'the standard of reasonableness [applied] to agency search procedures does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials.'" The court pointed out that "here, the defendants searched the files associated with the specific cases, which is where additional pleas agreements would likely be found. The

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fact that they were unable to find any additional plea agreements does not render this search inadequate. The search performed was reasonably calculated to uncover the requested documents. Since there are no other outstanding document requests, the case is moot." (*John M. Hardimon v. Executive Office of United States Attorney's, et al.*, Civil Action No. 18-1763 RWS, U.S. District Court for the Eastern District of Missouri, Nov. 5)

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