Volume 45, Number 24
December 11, 2019

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
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: Mike Gentine, a former staffer at the Consumer Product Safety Commission, writes in the National Law Review about the likely impact of the Supreme Court's decision in Food Marketing Institute v. Argus Leader Media, rejecting the substantial harm test and instead recognizing a customarily confidential standard, on records submitted by businesses under the Consumer Product Safety Act. Gentine notes that "Section 6(a) expressly incorporates the meaning of the word 'confidential,' so the FMI Court's test imports directly into the CPSA." As to assurances of confidentiality, Gentine explains that Section 6(b)(1) allows companies to review any proposed CPSC disclosure that would identify a particular product or manufacturer, whether or not the information is marked confidential. Gentine points out that "this is an assurance that the CPSC will handle even potentially sensitive information sensitively." He adds that "by requiring the CPSC to adopt the FOIA's protection for confidential business information, Section 6(a) provides further assurance that the agency will respect confidentiality, particularly in light of FMI."

Court Finds Commission Subject to FOIA

In finding that the National Security Commission on Artificial Intelligence is an agency subject to FOIA, Judge Trevor McFadden has drawn some distinctions between entities that are part of the Executive Office of the President, which are frequently not subject to FOIA because their primary function is to advise the President, and entities that are further removed from the presidential orbit because they are located in an executive department, such as the Defense Department.

The Commission was established as part of the 2019 Defense Authorization Act "to review advances in artificial intelligence, related machine learning developments, and associated technologies." The Commission consisted of 15 members. The Secretary of Defense appointed two members, while the Secretary of Commerce appointed one. The chair or ranking member of six congressional committees appointed the others. The Commission was required to submit three reports to the President and Congress. An initial report was due within 180 days of its creation, and an interim report was due

in August 2019. Both reports were submitted late. In February, the Electronic Privacy Information Center submitted a FOIA request to DOD for records concerning the Commission. By that time, the Commission had held 13 meetings and had received more than 100 briefings. EPIC asked for expedited processing which was denied. In September 2019, EPIC submitted requests under FOIA as well as the Federal Advisory Committee Act directly to the Commission. After EPIC filed suit against DOD, McFadden held a hearing at which it became evident that the Commission was more likely to have the records EPIC sought than was DOD itself.

The government argued that the Commission was not an agency subject to FOIA. McFadden pointed out that in the authorizing statute, the Commission "shall be considered *an independent establishment of the Federal Government as defined by section 104 of title 5."* McFadden indicated that "Section 104 of title 5, meanwhile, explains 'for purposes of this title, "*independent establishment 'means. . .an establishment in the executive branch*. . .which not an Executive department, military department, Government corporation, part thereof, or part of an independent establishment.' Congress could have hardly been clearer. Having said that FOIA applies to '*any*. . .establishment in the executive branch,' it chose to call the Commission an 'establishment in the executive branch.'"

McFadden cited *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, 917 F.2d 581 (D.C. Cir. 1990), as a prior D.C. Circuit decision that had reached an identical conclusion – that an entity housed in the Defense Department was intended to be a separate agency under FOIA. McFadden pointed out that the D.C. Circuit "looked at the whole of the Board's statute and found 'nothing to indicate that Congress intended to excuse the Board from complying with FOIA.' The same is true here."

In response, McFadden noted, "the Government urges that 5 U.S.C. § 552(f)(1) does not mean what it says. By its terms, § 552(f)(1) declares that 'any. . .establishment in the executive branch' is subject to FOIA. But the Government says not so. The Government contends that, the caselaw *requires* a non-literal reading," pointing to *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), which established the sole function test for agencies whose only role was to advice the President. But McFadden observed that "the relevance of *Soucie*'s functional analysis is not immediately apparent. The decision came *before* the enactment of § 552(f)(1). It thus dealt with the general phrase 'authority of the Government,' not the more specific phrase 'establishment in the executive branch.'"

The government urged McFadden to consider the context in which the legislative history of the 1974 amendment showed congressional approval of *Soucie* for purposes of determining when an agency within the EOP was subject to FOIA, which was accepted by the Supreme Court in *Kissinger v. Reporters Committee*, 445 U.S. 136 (1980). To this argument, McFadden responded that "whatever misgivings the Court may have about using legislative history, the Court is bound by the higher courts' repeated reliance on the conference report the Government identifies. The D.C. Circuit has cited that report to hold that not all entities in the White House are subject to FOIA, despite the plain terms of § 552(f)(1). So this would be a much different case if the Commission were in the White House. But it is not."

However, McFadden observed, the government drew a larger principle from *Soucie*. "According to the Government," McFadden noted, "*whenever* it would raise separation of powers concerns to say that an entity is subject to FOIA, the text of § 552(f)(1) must give way. The canon of constitutional avoidance would kick in, and a court would have to apply *Soucie*'s functional test to determine whether the entity must comply with FOIA." He added that "the Government reasons that under *Soucie*'s functional test, the Commission does not exercise 'substantial independent authority,' and is thus exempt from FOIA."

Rejecting the governments arguments, McFadden pointed out that "the Government reads far too much in the *Soucie* line of cases. These cases do not hold that the functional test applies *whenever* imposing FOIA on

an entity would raise separation of powers concerns. They stand for the much narrower proposition that a functional approach is apt when the question is whether an official or entity *close to the President* must comply with FOIA." He added that "the cases that rely on this legislative history apply a functional analysis given a *specific* separation of powers concern. That specific concern is not at issue here. This case does not involve presidential staff or an entity in the White House. Indeed, the Government stresses that the Commission is *far removed* from the President."

The government argued that *Dong v. Smithsonian Institution*, 125 F. 3d 866 (D.C. Cir. 1997), in which the D.C. Circuit found that the Smithsonian Institution was not subject to FOIA because it was not an establishment in the executive branch, supported its position here. But McFadden noted that "*Dong* simply did not make the step that the Government insists it made. The court did not apply a functional test *because* of separation of powers concerns. It applied a functional test because the Smithsonian was neither an 'establishment in the executive branch' nor a 'Government controlled corporation.'"

McFadden explained that "Congress chose to call the Commission an 'establishment in the executive branch.' The Government has not convinced the Court that it should ignore what Congress said. And even under the Government's preferred functional approach, the Commission is still subject to FOIA. The Court thus concludes that the Commission must comply with FOIA." Having made this conclusion, McFadden indicated that there were unresolved issues pertaining to EPIC's requests that would need to be addressed now that the Commission was required to comply with its requests. (*Electronic Privacy Information Center v. National Security Commission on Artificial Intelligence, et al.*, Civil Action No 19-02906 (TNM), U.S. District Court for the District of Columbia, Dec. 3)

Views from the States

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

Arkansas

The supreme court has ruled that University of Arkansas-Little Rock law professor Robert Steinbuch's challenge to the trial court's ruling that he was required to pay the attorney's fees for the class of law students whose privacy rights were implicated by Steinbuch's FOIA requests for data that included identifying information about law students over a 10-year period is moot. The law school rejected his requests, claiming release of the information would violate the privacy rights of the students. The trial court agreed and instructed Steinbuch to pay for the attorney's fees of students seeking to block disclosure. Although the FOIA claim was settled, the case, which included whistleblower and other claims, continued. The supreme court agreed that the issue of attorney's fees associated with the FOIA request was moot. The court indicated that "in its May 14, 2018 order – three months before the remaining claims were dismissed – the [trial] court indicated that the parties had negotiated a settlement and resolved the FOIA claims." The supreme court noted that "based on this finding, any judgment rendered on the issue of payment of attorney's fees would not have a practical legal effect on an existing legal controversy. Accordingly, the issue is moot. We have consistently held that we will not review issues that are moot because to do so would be to render advisory opinions." (*Robert Steinbuch v. University of Arkansas, et al.*, No. CV-18-973, Arkansas Supreme Court, Dec. 5)

ACCESS REPORTS

Illinois

A court of appeals has ruled that the names of students receiving financial aid through the state's Monetary Award Program, administered by the Illinois Student Loan Commission, is specifically exempt from disclosure under the Freedom of Information Act. MAP grant money is offered to Illinois residents who cannot afford to complete their postsecondary education. Initial eligibility is entirely needs-based and does not take into account high school test grades or test scores, but grant renewal is conditioned on good academic standing. ISAC provided a large amount of statistical data on its website which does not include identifying student information. Brian Timpone requested the names of all students receiving a 2015 MAP grant, including the name of their colleges and their home addresses. Timpone subsequently amended his request to ask for zip code information rather than home addresses. ISAC disclosed more than 50 pages aggregating the 2015 MAP grants by city and disclosing the total amount and number of recipients in each location. Unsatisfied with that response, Timpone filed suit, challenging the agency's ability to withhold student names. The trial court ruled in his favor and granted his petition for attorney's fees. ISAC then appealed to the court of appeals. The court of appeals first noted that the privacy exemption in the Illinois FOIA, combined with a provision specifically protecting student financial information that came from federal, state, or local sources, protected the information. However, the Illinois legislature added an amendment in 2018 specifically exempting student information pertaining to grants administered by ISAC. The court of appeals explained that income levels for students eligible for the ISAC grants was available on its website. The appeals court then noted that "once Timpone had individual student names as well as the income characteristics which were already published for each learning institution, Timpone would have the students' 'personally identifiable information' and 'confidential information.' Individual student names are thus exempted under [the privacy exemption] from Timpone's FOIA request." The court concluded that "given the detailed personal information of MAP applicants and recipients that has been disclosed and maintained on ISAC's public website, we conclude that the further disclosure of the names of MAP grant recipients would invade the privacy of those individuals." (*Brian Timpone v. Illinois Student Assistance Commission*, No. 1-18-1115, Illinois Appellate Court, First Judicial District, Dec. 11)

Kentucky

A court of appeals has ruled that records pertaining to a complaint filed by a Legislative Research Commission staff member against a member of the Kentucky General Assembly are not protected by legislative immunity. The records were requested by Daniel Descrochers, a reporter for the Lexington *Herald-Leader*. LRC general counsel responded to Descrochers' request by indicating disclosure of the records would be an invasion of privacy. Descrochers contacted LRC again, indicating that he would accept a redacted version of the records. After hearing nothing further from LRC, the *Herald-Leader* filed suit. LRC then issued a denial, claiming invasion of privacy. LRC argued that the records were protected by legislative immunity. The trial court rejected the claim of legislative immunity and indicated that the legislature had waived immunity by providing access to LRC records under the Open Records Act. LRC then appealed. The court of appeals noted that "the General Assembly expressly provided for a right to judicial review of LRC denials of open records requests. By establishing a mechanism for seeking open records and providing for judicial review of adverse determinations of the Director and the LRC, the General Assembly waived legislative immunity under the facts before us. As such, the circuit court determined that even of legislative immunity would apply to a legislative staffer on non-legislative matters, such immunity was statutorily waived." (*Becky Harilson v. Lexington H-L Services, Inc.*, No. 2018-CA-001857-MR, Kentucky Court of Appeals, Nov. 22)

Vermont

The supreme court has ruled that the trial court properly dismissed a counterclaim against the Burlington School District by Adam Provost, who sued to block the school district from disclosing his unredacted resignation letter to the media. In response to a Public Records Act request from Seven Days, the school district notified Provost that it intended to disclose an unredacted copy of his resignation letter. Provost's attorney told the school district that he objected to disclosure. To resolve the dispute, the school district filed a motion for declaratory judgment. Although Provost had threatened to take legal action, he did not file an opposition. After Provost failed to respond, the trial court ordered the unredacted letter disclosed. Provost then filed a motion to reconsider, arguing that the court did not have jurisdiction under the PRA to issue a declaratory judgment. The supreme court upheld the trial court's authority to issue a declaratory judgment, noting that "Provost emphasizes that the PRA does not explicitly permit a custodian to seek declaratory relief when confronted with a public records request. But neither does the PRA bar obtaining such relief within the civil division's general jurisdiction." The supreme court observed that "insofar as Provost failed to articulate any argument, or make any proffer, in the proceedings before the civil division explaining why the PRA prohibited disclosure of an unredacted copy of the Resignation Agreement, the civil division did not err in granting the District's request for declaratory relief and entering judgment in favor of the District." (*Burlington School District v. Adam Provost, et al.*, No. 2019-025, Vermont Supreme Court, Dec. 6)

The Federal Courts…

A federal court in California has ruled that the Department of Labor has not shown that EEO-1 reports requested by the Center of Investigative Reporting can be withheld under **Exemption 4 (confidential business information)**, even after the Supreme Court, in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), replaced the substantial competitive harm test with a customarily confidential standard. In fact, the CIR litigation was stayed by the district court at the request of the Labor Department until the Supreme Court ruled in *Argus Leader*. CIR reporter Will Evans asked for federal contractors' employment diversity reports, known at EEO-1 reports, for 55 named companies. Labor told CIR that only 36 of the named 55 companies were federal contractors. Because the EEO-1 reports contained confidential business information, the agency sent pre-disclosure notification letters to all 36 companies. Twenty companies responded to the pre-disclosure notification letters, claiming they considered the reports to contain confidential business information. CIR filed an administrative appeal and filed suit a month later. By the time the court ruled, the disputed records focused on Labor's decision to withhold 10 EEO-1 reports. Magistrate Judge Kandis Westmore explained initially that "there is no salary information, sales figures, departmental staffing levels, or other identifying information in these reports. Rather, the diversity reports merely disclose the workforce composition to ensure compliance with Executive Order 11,246 which prohibits discrimination by federal contractors." The agency argued that the information was commercial and provided declarations from several submitters to support its claim. Noting that the declarations for various businesses frequently contained nearly verbatim language supporting the commercial nature of the information, Westmore observed that "the EEO-1 form does not ask submitting companies to explain how resources are allocated across a company's 'segments.' Rather, the report is organized by job category, such as 'Professionals,' 'Sales Workers,' 'Operatives,' 'Craft Workers,' 'Laborers and Helpers,' etc. It does not request demographic information by division, department, or 'segment.' The data sought is companywide." Westmore pointed out that other declarations argued that disclosure would allow competitors to lure away skilled workers. Again, Westmore expressed skepticism, noting that she found "the claim that the EEO-1 reports would make it easier for competitors to lure away talent dubious, since the job categories are so general. . .Since there is no breakdown

ACCESS REPORTS

by department, the total number of professionals reported not only includes the company's computer programmers and engineers, but also its lawyers and accountants." Labor also argued that disclosure would make it more difficult for contractors to recruit needed workers. Pointing out that the information contained in the EEO-1 reports was far too general to support such a claim, Westmore observed that "essentially, the Government is asking the Court to find exempt any statistical information pertaining to employees simply because the business is a commercial enterprise. This expansive interpretation has been rejected." Having found that the agency had not shown that the EEO-1 reports contained commercial information, Westmore next considered whether they were confidential. Westmore noted that in *Argus Leader*, the Supreme Court explained that "uncontested testimony established that the information was not disclosed, nor made 'publicly available in any way,' suggested that it was confidential." She pointed out that here at least one company had published data from its EEO-1 report in its annual report. Unlike her district court colleague, Judge William Allsup, who found that the inclusion of a provision in the 2016 FOIA Improvement Act extending the foreseeable harm test to all exemptions did not undermine *Argus Leader*, Westmore noted that "the FOIA request in *Argus Leader* was filed before FIA was enacted, so the foreseeable harm was not applicable. In fact, the Supreme Court did not address the validity of the foreseeable harm standard. Today, FIA codifies the requirement that the agency articulate a foreseeable harm to an interest protected by an exemption that would result from disclosure. Here, the Government does not attempt to make such a showing, and instead relies on *Argus Leader* as the reason why it need not do so." Westmore also found that the agency had not considered **segregability**. Sending that issue back to the agency, she pointed out that "the Government is free to look into the feasibility of segregation; however, it had an obligation to segregate and release nonexempt information when the request was made, which it did not do." (*Center for Investigative Reporting v. U.S. Department of Labor*, Civil Action No. 19-01343-KAW, U.S. District Court for the Northern District of California, Dec. 10)

The D.C. Circuit has ruled that Kay Khine, an asylum seeker from Myanmar who was represented by Catholic Charities, **failed to exhaust her administrative remedies** when she filed suit after receiving an initial determination from the Department of Homeland Security rather than filing an administrative appeal. DHS responded to Khine's request for her entire asylum file by telling Khine that it had located 871 responsive pages and planned to disclose 849 pages in full and 11 pages in part. Rather than filing an administrative appeal, Khine filed suit, claiming that the agency had not provided sufficient information for her to make a meaningful administrative appeal because it failed to explain the reasons for why the assessment was withheld and whether any portion of the assessment could be segregated and disclosed. The last count in the complaint alleged a policy or practice claim on behalf of Catholic Charities for providing inadequate initial determinations to asylum seekers. The last count sought to represent a class of all asylum seekers who had received inadequate initial determinations from DHS since September 2011. The district court dismissed Khine's suit for failure to exhaust her administrative remedies. The D.C. Circuit affirmed the district court's ruling. Khine argued that if she had appealed the agency's determination, she would have lost the ability to challenge it later in court. But Circuit Court Judge Cornelia Pillard noted that "if the administrative appeal had given her what she sought, and thereby foreclosed judicial review, the administrative process would have been working as it should. Khine's desire to avoid mooting her claim does not justify her failure to exhaust her administrative remedies." Khine characterized her suit as an attempt to force the agency to better explain its determination. But Pillard explained that "a non-repeat FOIA requester like Khine lacks standing to 'seek a reformation' of the way an agency handles its FOIA requests. Such a claim is a challenge to an agency 'policy or practice.'. . The problem for Khine is that only repeat requesters who 'will suffer continuing injury' have standing to bring such claims. . . Since Khine is not likely to be subject again to the agency practice she seeks to challenge, she does not have standing to seek a 'reformation' of DHS' initial determinations, and she cannot rely on that interest to justify her failure to exhaust." In response to Khine's allegation that the agency's initial determinations would be immune from judicial review, Pillard pointed out that "there is a party who might have brought a policy-or-practice claim: Catholic Charities. But, on appeal, counsel for Khine and Catholic

Charities repeatedly stated that Catholic Charities was not itself a requester of the information at issue and that Khine was the sole requester in this case." She explained that "even though FOIA permits 'any person' to make a FOIA request and Catholic Charities could have sought Khine's asylum file, we take counsel at his word and accept that Catholic Charities is not a requester here. Because only an entity that has filed a FOIA request (and will do so again in the future) may bring a policy-or-practice claim, Catholic Charities, too, lacks standing to pursue such a claim in this case." Khine also argued that she was not required to appeal the agency's determination because it did not provide the reasons for its determination. Noting that Khine was challenging the legal adequacy of the agency's determination, Pillard referred to *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013), in which the D.C. Circuit ruled that, at a minimum, an agency determination required the agency to (i) gather and review the documents, (ii) determine and communicate the scope of the documents and explain the reasons for any withholding, and (iii) inform the requester of the right to appeal the agency's determination. Pillard pointed out that the agency had met the first two requirements. As to the third, she observed that "the initial determination here provided reasons by listing and defining the exemptions the agency applied to the records responsive to Khine's request." As for Khine's assertion that the agency did not provide the reasons for why nothing was segregated from the assessment report, Pillard observed that "we do not require the agency at this stage, as Khine appears to suggest, to provide a document-by-document *Vaughn* index. . ." Pillard also rejected Khine's claim that the exhaustion requirement should be excused. She pointed out that "short of a properly presented claim that the agency has a policy or practice of providing inadequate initial determinations, we cannot conclude that Khine's interest in immediate judicial review outweighs the agency's interest in managing and completing its administrative process." (*Kay Khine and Catholic Charities v. United States Department of Homeland Security*, No. 18-5302, U.S. Court of Appeals for the District of Columbia Circuit, Dec. 6)

Judge Trevor McFadden has ruled that the Department of Justice has not shown that draft financial disclosure forms prepared for Matthew Whitaker when he was appointed acting Attorney General are protected by **Exemption 5 (privileges)**. BuzzFeed News requested Whitaker's draft financial disclosure forms the day after the final version was publicly disclosed. After the agency failed to provide the drafts, BuzzFeed filed suit. DOJ declined to disclose 14 earlier versions, withholding them under Exemption 5 and **Exemption 6 (invasion of privacy)**. McFadden explained that "to qualify for the deliberative process privilege, the draft versions of Whitaker's [Office of Government Ethics] forms must have been both 'pre-decisional' and 'deliberative.' BuzzFeed argues that because the forms themselves 'could not possibly have made any recommendations or expressed any opinions, they are not deliberative.' The Court agrees. Whitaker submitted his OGE forms to DOJ's ethics officials, they share the forms among themselves and with Whitaker several times before final approval. The ethics officials followed this process to 'accurately complete the forms under the applicable statute, regulations, and guidance.' But DOJ has not carried its burden of establishing that the draft forms themselves reflect the deliberative process, so the exemption does not apply." BuzzFeed acknowledged that the draft forms were pre-decisional, but McFadden indicated that was irrelevant under the circumstances. He observed that "communications or documents that simply 'promulgate or implement an established policy of an agency' are not pre-decisional. So we turn to that question: whether the draft forms express DOJ's policy opinions. As it turns out, they do not." He pointed out that "it is unclear that the ethics officials' revisions had anything to do with the 'give-and-take of the consultative process' that leads to policy. DOJ was not formulating policy at all. Its ethics officials were merely trying to assist in the accurate completion of Whitaker's financial disclosure forms in compliance with the Ethics in Government Act and OGE policy." McFadden indicated that "BuzzFeed has not asked for deliberative records. BuzzFeed disclaims any interest in the internal emails in which the forms were attached or other documented communications, asking only for Whitaker's draft forms themselves. To be clear, the draft forms at issue here are fill-in-the-blank standardized forms that seek purely factual information about the filer's financial situation. It is the emails that presumably contain the back-and-forth of questions and advice

ACCESS REPORTS

within the ethics office and between the ethics office and Whitaker that the deliberative process privilege arguably protects." McFadden then observed that "by its own admission, DOJ had no discretion at all. It could only certify Whitaker's forms when they 'correctly and completely' represented his financial information as required by law. And the mere collection of facts does not constitute a privileged decision." McFadden rejected the agency's broad claims that disclosure would have a chilling effect of future deliberations. Instead, he noted that "indeed, the forms at issue contain no discussions at all, candid or otherwise." McFadden agreed with the agency that Whitaker's forms contained personal information. He observed that "here, the categories of information in Whitaker's draft forms convey intimate information about his financial affairs. . .The financial information listed in the forms is intensely personal and meets the threshold privacy requirement." By contrast, McFadden explained that "in any event, Congress provided much of this balancing when it enacted the Ethics in Government Act. . .Congress's determination that other financial data need not be self-disclosed speaks just as clearly about financial details that should *remain private*. And BuzzFeed should not be able to use FOIA to do an end-run around the disclosure lines Congress established in the Ethics in Government Act." Turning to the issue of **segregability**, McFadden pointed out that "there are [several] ways the drafts and the final versions may differ. He observed that "where Whitaker under-reported on a draft submission there is no justification for withholding the draft, because it is simply missing an entry available in the final version. He has no privacy interest in missing information." He added that "Whitaker may have reported an asset, position, liability, transaction, or other entry that was modified in some way before the final version. . . Here again, there is no justification for withholding the drafts, because they report the same underlying information in the final form but use different language or monetary values." (*BuzzFeed, Inc. v. U.S. Department of Justice*, Civil Action No. 19-00070 (TNM), U.S. District Court for the District of Columbia, Dec. 4)

Judge Carl Nichols has ruled that U.S. Immigration and Customs Enforcement may categorically withhold the names of detainees in its Criminal Arrest Records and Immigration Enforcement Records (CARIER) records system under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The Center for Investigative Reporting submitted two FOIA requests for information about detainees contained in the CARIER system. After CIR filed suit, ICE disclosed several Excel spreadsheets with redactions made under the privacy exemptions for information identifying the detainees and those who furnished their bonds. ICE subsequently agreed to disclose identifying information about businesses and non-profit organizations that furnished bonds in exchange for CIR's agreement not to pursue release of identities of individuals who furnished bonds or more detailed information – such as tax identification numbers or phone numbers – for businesses or non-profits that furnished bonds. Nichols noted that since the records were compiled for law enforcement purposes, the more protective standard of Exemption 7(C) applied. Although CIR argued that the names of many of the detainees could be located through an online search, Nichols agreed with the agency that the additional information here created a substantial privacy interest. He pointed out that "while a search of ICE's online locator system yields a name associated with a detention center and country of origin, it does not include the additional information that CIR has already obtained and that would be associated with detainees' names if they were produced: immigration history, education history, domestic and foreign criminal history, location of arrest, case category, charges brought in the case, case disposition, and other details." Against that substantial privacy interest, Nichols noted that "that's where CIR's case falters: neither in its Complaint nor its briefing does it ever assert *any* public interest in the disclosure of the detainees' names. CIR repeatedly argues that 'ICE did not prove any privacy interest exists at all, let alone a privacy interest rising to the requisite threshold,' and thus rests its argument entirely on the contention that the 'Court need go no further and should order the records produced.' CIR's failure to assert any public interest in disclosure requires summary judgment for ICE." (*Center for Investigative Reporting v. U.S. Immigration and Customs Enforcement, et al.*, Civil Action No. 18-01964 (CJN), U.S. District Court for the District of Columbia, Dec. 3)

Judge Amit Mehta has ruled that the Department of Energy properly withheld seven documents under **Exemption 5 (privileges)**, although it failed to provide a **segregability analysis**, but it has not yet shown that it **conducted an adequate search** in response to a FOIA request from the Climate Investigations Center for records about a clean-coal technology powerplant in Mississippi known as the Kemper Project. Mehta found that the seven remaining documents qualified for protection under the deliberative process privilege. Agreeing with the agency's explanation of why the privilege applied, Mehta pointed out that "similar descriptions are provided as to the other documents at issue. These explanations sufficiently establish that the material in question 'was generated before the adoption of an agency policy' and 'reflects the give-and-take of the consultative process.'" But he noted that any segregability review was lacking. He pointed out that "here, neither [the agency's declarant] nor any other DOE representative has made an affirmation about segregability review. As this court has previously held, for an agency to meet its segregability burden of proof, it must provide not only a detailed *Vaughn* index, but also an affidavit affirming that the agency performed a 'line-by-line segregability review.'" Mehta found that Climate Investigations Center had provided new evidence that further responsive records existed in the Office of the Secretary. Ordering another search, he observed that "plaintiff has offered records indicating a significant number of communications with the Office of the Secretary that are independent of the Office of Fossil Energy and NETL during the tenure of two different Energy Secretaries. And while DOE's search has already turned up numerous communications showing the involvement of the Office of the Secretary, the previous searches would not have captured internal communications within the Office, such as documents reflecting 'meetings between staff within the Office of the Secretary, records of phone calls, or other internal contacts within the Office of the Secretary. Plaintiff has thus identified the sort of 'clear lead' showing the search was inadequate and therefore the court finds it appropriate to order a search of the Office of Secretary." (*Climate Investigations Center v. United States Department of Energy*, Civil Action No. 16-00124 (APM), U.S. District Court for the District of Columbia, Dec. 6)

A federal court in Utah has ruled that the Department of Justice failed to show that its response to Dennis Williams' request for records on his own whistleblower complaint was proper under **Exemption 5 (privileges)** but agreed with the agency that most of the records were protected under **Exemption 6 (invasion of privacy)**. DOJ referred his request to the Office of Professional Responsibility, which disclosed some records but withheld 516 pages. The FBI withheld an additional 16 pages. Williams submitted a second FOIA request to the Criminal Division for records on the possible prosecution of Thomas Pickard. The Criminal Division issued a *Glomar* response neither confirming nor denying the existence of records. Williams filed suit, challenging the agency's responses to both of his requests. OPR withheld all 516 pages about the investigation of Williams' whistleblower complaint under a combination of Exemption 5 and Exemption 6. Noting that the parties agreed that the records were pre-decisional, the court pointed out that the issue was whether or not they could be considered deliberative. The court observed that some of the records were clearly deliberative and properly withheld, but then indicated that some documents "were improperly withheld in full because they contain segregable information." Referring to Williams' whistleblower complaint, the court noted that "the factual statements are segregable from the author's deliberative commentary and thus OPR should redact the deliberative commentary, redact any personal information under Exemption 6, and release the remainder of the document." The court explained that "most of the documents were improperly withheld under Exemption 5 but should be partially withheld under Exemption 6. The remaining documents. . .are handwritten notes or transcripts of witness interviews. These documents are factual as they do not contain opinions, rationale, recommendations, or conclusion of the interviewer or author." The court then faulted OPR for withholding identifying information of individuals mentioned during Williams' investigation. Instead, the court noted that "although the Government may be able to withhold the names of witnesses and subjects of investigation, it must still release all reasonably segregable material." As to the FBI's withholding of identifying information, the court pointed out that the

lower threshold of **Exemption 7(C) (invasion of privacy concerning law enforcement records)** applied to that agency. Williams argued that there was a public interest in knowing whether public servants were involved in misconduct. But the court indicated that "while this may be true, there is nothing contained in the 16 pages withheld by the FBI that would shed light on such conduct." Turning to Williams' second FOIA request for records the prosecution of Thomas Pickard, the court noted that the Criminal Division had withdrawn its *Glomar* response and searched for responsive records but found none. The court noted that since Williams had not challenged the search, its no records response to the Pickard request was appropriate. (*Dennis O. Williams v. United States Department of Justice*, Civil Action No. 17-699 TS DBP, U.S. District Court for the District of Utah, Dec. 9)

A federal court in Kansas has ruled that the Department of Justice properly withheld documents from its library dealing with litigation under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. DocuFreedom requested 119 items from DOJ's library. The agency withheld 17 items and redacted portions of emails. In its prior opinion, the court upheld most of DOJ's claims but told the agency it needed to provide more justification for some items. The court found many of the documents were protected under the attorney work-product privilege. The court pointed out that "even though these documents do not apply to specific cases, 'Exemption 5 extends to documents prepared in anticipation of foreseeable litigation . . .even if no specific litigation is contemplated.' [The items] all were prepared in anticipation of litigation because they outline the legal strategies of attorneys who litigate on the government's behalf. These items fall within the scope of work product protection because they present guidance about 'recurring, parallel factual settings and identical legal and policy considerations.'" DOJ had also asked the court to withhold the names of DOJ employees in a document titled "Expertise in the Civil Division" under Exemption 6. Acknowledging that the record only contained a list of names and contact information, the court nonetheless found it was protected under Exemption 6, noting that the exemption "'broadly exempts disclosure of all information that applies to a particular individual.'" The court found that three remaining items containing manuals that were hundreds of pages in length could not be **segregated**. The court noted that "each chapter is about a different aspect of prosecutors' federal criminal discovery obligations. In sum no part of Items 39,49, or 50 is segregable because all sections serve an adversarial purpose." (*DocuFreedom, Inc. v. United States Department of Justice*, Civil Action No. 17-2706-DDC-TJJ, U.S. District Court for the District of Kansas, Dec. 6)

Judge Reggie Walton has ruled that the FBI properly responded to two requests from Leo Spurling, a prisoner who was serving a life sentence for murder at a Kentucky state prison when he was convicted of the 1988 murder of fellow inmate Glenn Burks, under **Exemption 7 (law enforcement records)**. Spurling, who was allegedly a member of the Aryan Brotherhood, was given two life sentences for murdering Burks, who was black, but his sentence was ultimately reduced to 20 years. Spurling was also involved in an escape attempt in 1988 and was given an additional 15 years after he was recaptured. Because of the racial overtones of the murders of Burks and another black inmate, unidentified prisoners at the Kentucky prison contacted an anti-racism organization in Louisville, which contacted the FBI. The FBI then investigated the incidents but none of those records were made available to Spurling during his trial for Burks' murder and his subsequent escape. In July 2016, Spurling made two requests to the Department Justice for records pertaining to his escape and to his conviction for murdering Burks. In a response to his requests, the FBI told Spurling that it reviewed 240 pages and released 157 pages in full or with redactions. A month later, the FBI told Spurling that it had reviewed an additional 503 pages, releasing 13 pages in full or in part, and withheld the remaining 441 pages. Spurling did not challenge the adequacy of the agency's search but complained that the agency had improperly treated his requests as **Privacy Act** requests. Walton found that was not the case, pointing out that "even if the FBI could have withheld all of the responsive records under a Privacy Act exception, the FBI also processed the plaintiff's request for documents under the FOIA, just as the plaintiff demanded. Thus, the FBI's declarant explains, 'none of the information exempt from disclosure under the Privacy Act has been withheld. . .unless it was withheld under a FOIA exemption.'" Spurling argued that the privacy interest of the

Special Agent who was in charge of the investigation had been waived because his name became public during the investigation. Walton noted, however, that "the privacy interest at stake belongs to the individual, not the government agency. Even if the plaintiff knows that [the] special Agent may have received information from the Kentucky State Police and may have conducted an investigation involving the plaintiff, the agent's privacy interest is not extinguished because the requester knows or can surmise his identity." Walton pointed out that "plaintiff is under the mistaken impression that the FBI may withhold third party information only if its release *certainly* will endanger the protected individuals. Not so. However, it is sufficient that the declaration demonstrates an invasion of the third parties' privacy could reasonably occur upon release of their identities, even if they testified publicly or if the plaintiff is able to identify them." Walton also recognized that family members of two murdered inmates had privacy rights as well. He observed that "notwithstanding the passage of more than 30 years, these victims and their families retain diminished yet cognizable privacy interests which are deserving of protection." Spurling asserted that the privacy interests of individuals who had been convicted of crimes was diminished. But Walton pointed out that "this Circuit has held that the FOIA categorically exempts from disclosure identifying third party information in law enforcement records on the ground that associating them with a law enforcement investigation reasonably could bring about an unwarranted invasion of their privacy." (*Leo Cornelius Spurling v. U.S. Department of Justice*, Civil Action No. 17-0780 (RBW), U.S. District Court for the District of Columbia, Dec. 2)

Editor's Note: This is the last issue of Access Reports for 2019. The next issue, volume 46, n. 1, will be dated January 15, 2020.

# #