Volume 46, Number 13
July 1, 2020

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

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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: U.S. Immigration and Customs Enforcement has been reclassified as a security agency, allowing it to withhold personally identifying information under Exemption 6 (invasion of privacy). An ICE memo indicated that "the administration classified ICE as a 'Security Agency.' This designation will ensure that OPM withholds all relevant personally identifiable information (PII) of all ICE personnel when it processes FOIA requests moving forward, just as it does for other law enforcement agencies and federal prosecutors"

Court Upholds FBI's Exemption Claims After Reviewing Sampling

Judge Beryl Howell has ruled that the Department of Justice has demonstrated through its sampling that almost all of the FBI's exemption claims were appropriate in resolving challenges brought by researcher Ryan Shapiro pertaining to multiple FOIA requests Shapiro submitted for records on animal rights activism, including Shapiro himself. Because the parties agreed that the only practical way to address the volume of responsive records was to use a representative sampling, much of Howell's 107-page opinion addresses the sparse case law on sampling, particularly the potential pitfalls of changing the integrity of a sampling midstream.

Shapiro submitted 83 requests to the FBI and the Bureau of Alcohol Tobacco and Firearms between 2005 and 2012. In responding to the requests, the FBI reviewed 614,000 pages and 160 CDs/DVDs, disclosing 38,788 pages and 28 CDs/DVDs. After finding that both agencies had conducted adequate searches, Howell pointed out that the parties had agreed to test the FBI's processing of records using only a sample of the records produced.

Howell explained that her first goal was to determine the appropriateness of that sampling and whether it ran afoul of previous cases in which subsequent agency disclosures had changed the character of the sample sufficiently to make it no longer representative of the original sampling.

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Sampling is a court-created remedy to address the problem of requests that are too large to be managed practically by agencies. Although courts have consistently ruled that the mere potential size of a request is not sufficient on its own to justify dismissal, sampling has become a well-recognized alternative to manage voluminous requests. While what constitutes a voluminous request is still a matter of court discretion, the procedures and policies for creating and reviewing samplings of records is reasonably well-established. However, not unexpectedly, since challenges to sampling procedures rarely result in court decisions, the case law on sampling is sparse. The leading case is still *Bonner v. Dept of State*, 928 F.2d 1148 (D.C. Cir. 1991), in which the D.C. Circuit faulted the State Department for changing the integrity of the representative sampling by later disclosing records that were part of the original sample.

Howell began by noting that early on sampling cases follow the same basic path as do most other run-of-the-mill FOIA litigation – a representative sampling of responsive records is chosen; the agency prepares a detailed index; the parties brief the propriety of redactions or withholdings made within the sample; the court reviews the justifications for the withholdings, determines whether records were improperly withheld, ordering the agency to disclose those records improperly withheld; and then determines the error rate by dividing the number of improperly withheld records by the total number of withholdings. She explained that "the error rate is used as a rough measure of whether responsive records not included in the sample were properly withheld. If the rate is 'negligible,' that ends the matter and summary judgment for the agency with respect to application of exemptions to the remaining withheld documents is appropriate. If, however, the error rate is 'unacceptably high,' the court may order the more drastic step of 'requiring agencies to reprocess *all* responsive records' that were withheld in full or in part. The sampling method's tolerance of negligible error rates recognizes that there is 'a trade-off between the high degree of confidence that comes from examining every item for which exemption is claimed, and the limitations of time and resources that constrain agencies, courts, and FOIA requesters alike.' For FOIA actions involving a massive volume of responsive records, like this one, however, the gains in efficiency the method produces are essential."

Howell then addressed the lessons of *Bonner*. She pointed out that "*Bonner* settles several issues. First, an agency's burden in a sampling case is to 'justify its initial withholdings' and the agency 'is not relieved of that burden by a later turnover of sample documents.' Indeed, when sampling is employed, the agency's *Vaughn* index should explain not only those withholdings the agency continues to defend, but also 'explain why [any] once withheld portions [of the sample] were excised at the time of the agency's initial review.'" She indicated that "moreover, *Bonner* holds that the calculation of the error rate must be based on the agency's initial withholdings. This heightens the importance of requiring that the agency justify these initial withholdings, for while the choice to disclose information by an agency may be an admission that the initial withholding was improper, this choice may also reflect the exercise of the agency's discretion to release information that may nonetheless be exempt." She noted that "finally, *Bonner* makes clear that, at least in sampling cases, 'court review properly focuses on the time the determination to withhold was made' and thus courts should be chary of requests to consider the effect of events that post-date the agency's response to the requests at issue."

Howell indicated that in Shapiro's case "the FBI has done itself no favors by giving the selected samples exactly the kind of special treatment *Bonner* warns against. As evident from the FBI's declaration, the Bureau re-reviewed the samples selected by the parties and altered its withholdings." She pointed out that "the re-review thus cast doubt on the utility of the sample in this case. Moreover, in addition to these changes, the FBI decided, while briefing in this action was ongoing, no longer to defend the application of certain exemptions and released still more material previously withheld." Shapiro argued that some of the FBI's original exemption claims had now expired with the passage of time. But Howell observed that "where relevant DOJ will not be required 'to follow an endlessly moving target" and this Court's review is constrained to determining the propriety of the agency's withholdings at the time they were made." Howell

also disagreed with Shapiro's claim that any misapplied exemption counted as an error. Instead, she pointed out that "the improper application of an exemption and an unjustified withholding are often one and the same, but not always. Commonly, a single exemption may be justified by more than one FOIA exemption."

A major dispute in dealing with the sampling was whether the categorical withholdings made by the FBI under Exemption 7(A) (interference with ongoing investigation or proceeding) were still valid or whether, as Shapiro contended, many of them had now expired because the investigations had been subsequently closed. The categorical Exemption 7(A) claims were included in a separate part of the sampling. Howell emphasized that the importance of consistent treatment of sampled records as recognized by the D.C. Circuit in *Bonner* was vital to a fair result in such large sampling cases. She pointed out that "to demand that DOJ undertake the Sisyphean task of checking that any exemptions properly applied during the three-year stay remain valid now would run counter to both the Circuit caselaw and common sense. Should the plaintiff wish to determine whether any investigation pending at the time of the FBI's responses have since expired, clearing the way for further disclosures by the Bureau, he may file a new FOIA request, 'but if he does, he will stand in line behind other FOIA requesters.''

Part II of the sampling contained all other exemptions claimed by the FBI. Howell approved the vast majority of those exemption claims, finding that the FBI's error rate was, at its highest, 16 percent, which was too low to consider it significant enough to require the agency to apply her findings to all documents not include the sampling. (*Ryan Noah Shapiro v. Dept of Justice*, Civil Action No. 12-313 (BAH), U.S. District Court for the District of Columbia, July 2)

Views from the States

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

Hawaii

The supreme court has ruled that both the trial court and the Intermediate Court of Appeals erred in finding that neither court had jurisdiction to hear pro se litigant James Smith's suit against the Office of Information Practices challenging OIP's opinion finding that the Maui County Council had not violated the Sunshine Law's open meetings provisions. The ICA found that Smith's only remedy was to sue the Maui County Council. The case began when Smith filed a complaint with OIP alleging that MCC had violated the Sunshine Law when the mayor and three of nine council members attended and participated in a February 2013 community meeting hosted by the Kula Community Association. Instead, OIP issued an opinion finding that MCC did not violate the meetings requirement because they there was not a quorum of its members present. Smith then filed suit against OIP. OIP argued in court that the Uniform Information Practices Act "does not authorize members of the public to appeal OIP Sunshine Law opinions" but instead allowed "individuals to bring actions in the [trial] court against state or county boards or commissions that may have violated the Sunshine Law, but not against OIP solely on the basis that OIP is the agency charged with administering the Sunshine Law." However, the supreme court found that since Smith was a pro se litigant the lower courts should have treated him more leniently. The supreme court pointed out that "here, Smith's 'Complaint to Initiate Special Proceeding' should have been treated as an original action. Thus, even though Smith was apparently under the mistaken impression that he could appeal the OIP Opinion. . .the [trial] court should have exercised its discretion to construe Smith's pro se pleading as a lawsuit seeking declaratory

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judgment and not as an appeal." The supreme court also found that OIP could be sued as a defendant under these circumstances, noting that "permitting original actions against OIP, a government agency, is consistent with the legislature's intent to promote transparency and the public's involvement regarding government agencies. The purpose of the Sunshine Law 'was to provide that discussions, deliberations, decisions, and actions of governmental agencies should be conducted as openly as possible and not in secret.'" (*In Re Office of Information Practices Opinion Letter No. F16-01*, No. SCWC-16-0000568, Hawaii Supreme Court, June 16)

Illinois

A court of appeals has ruled that zip code data included on a map of individuals who received mental health services from Cook County Health and Hospital Systems while detained at the Cook County Jail is protected by the Mental Health and Developmental Disabilities Confidentiality Act. The data was requested by Dr. Judy King, who requested the data after a CCHHS finance committee indicated that Chicago's Roseland community would be an appropriate site for a new community triage center. CCHHS provided the map but redacted the zip code information, claiming it was protected under the Confidentiality Act. The trial court ruled in favor of King and CCHHS appealed. The court of appeals pointed out that if the zip codes were protected from disclosure under the federal HIPAA Privacy Rule then they also qualified for protection under the Illinois Confidentiality Act. However, the court of appeals added that zip code information could be disclosed if it was de-identified to include only the first three digits. King argued that disclosure of the unredacted zip codes could not be used to identify the mental health recipients. The appeals court disagreed, noting that "our decision finding the unreacted zip codes to be protected information is not solely based on HIPAA, but on the Confidentiality Act. The Confidentiality Act, in turn, relies on HIPAA to establish what constitutes private health information. In this instance, HIPAA is not in conflict with the Confidentiality Act, but is incorporated therein." (*Dr. Judy King v. Cook County Health and Hospitals System*, No. 1-19-0925, Illinois Appellate Court, First District, Fourth Division, June 18)

New Hampshire

The supreme court has ruled that the technical review group of the City of Rochester is not a public body subject to the Right to Know Law's open meeting provisions. The TRG was created to review projects submitted for review to the Planning Board. Its membership was made up entirely of city employees appointed by the city manager. Paul Martin filed suit, claiming that the TRG was a public body subject to the open meetings law's requirements. Martin also challenged the city's fee schedule. Martin argued that the primary purpose of the TRG was to advice the Planning Board. The supreme court disagreed with Martin's characterization, noting that "a body's consideration of issues designated by the appointing authority in and of itself is not determinative of whether the body is an advisory committee. Rather, it is the purpose of the body's consideration that is the deciding factor – *i.e.*, whether the body's primary purpose is to consider issues 'designated by the appointing authority *so as to* provide such authority with advice or recommendations concerning the formulation of any public policy or legislation.' Because the TRG, as a committee, does not provide advice or recommendations, it is not an advisory committee." Martin's challenge to the city's fee schedule was that it did not reflect actual costs of copying. The supreme court rejected his claims, noting that "the legislature did not mandate use of a formulaic method for determining 'actual costs' and we decline the plaintiff's invitation to impose a requirement that the legislature did not see fit to include." (*Paul Martin v. City of Rochester*, No. 2019-0150, New Hampshire Supreme Court, June 9)

Oregon

A court of appeals has ruled that the trial court erred in finding that the City of Portland's claims that records protected by the attorney-client privilege superseded the requirement in the public records law that such privileges no longer applied to records that were more than 25 years old. Mark Bartlett requested four city attorney memos, all of which were more than 25 years old. Portland withheld all four memos, claiming they were privileged. The district attorney instead ordered them disclosed because they were more than 25 years old. Portland then filed for a declaratory judgment. The trial court ruled in the City's favor, finding the memos were still privileged. Bartlett filed an appeal. The court of appeals found that "here, the [relevant provision in the public records law] unambiguously states that records that are older than 25 years *shall* be disclosed *notwithstanding* the exemptions from disclosure contained in [the statute]." The appeals court pointed out that "the legislature chose to except only a limited number of documents from the 25-year sunset on exemptions from public disclosure; the exception did not include attorney-client privileged public records." The appeals court indicated that "the legislature may ultimately choose to reconsider which documents are excepted from the 25-year sunset provision and extend that exception to attorney-client privileged documents for longer or even indefinite periods of time. But we cannot do so without substantially redrafting the public records law, which is not within our authority." The City also argued that the Portland City Code created an independent basis for the attorney-client privilege for the documents at issue here. Again, the court of appeals disagreed. Instead, the appeals court observed that "we see no conflict in the state legislature deciding public records should be disclosed after 25 years even if the documents are otherwise subject to the attorney-client privilege under state law." (*City of Portland v. Mark Bartlett*, No. A164469, Oregon Court of Appeals, June 10)

Pennsylvania

The supreme court has ruled that the court of appeals erred in rejecting a decision made by the Office of Open Records finding that the Pennsylvania State Police had not shown that redactions made to its policy manual on monitoring social media were appropriate under the public safety exception because the appellate court did not review all the records relied upon by OOR in reaching its decision. The supreme court noted that "we do not gainsay the importance of proceeding cautiously when confronted with credible invocations of the public safety exception. But nothing in the record suggests that OOR was incautious. To the contrary, OOR appears to have considered every redacted section carefully against [the agency's] assertions in support of the redactions and reached reasoned conclusions that it documented in a thorough final determination. Indeed, OOR's individualized discussion of [the agency's] assertions were as detailed as the affidavit itself." The supreme court explained that "we hold only that the Commonwealth Court erred in overturning OOR's reasoned decision without conducting an equally careful inquiry. The Commonwealth Court unnecessarily denied itself the opportunity to conduct the fact-finding that the [Right-to-Know-Law] asks of it." (*American Civil Liberties Union of Pennsylvania v. Pennsylvania State Police*, No. 66 MAP 2018, Pennsylvania Supreme Court, June 16)

The Federal Courts…

Judge Rudolph Contreras has ruled that the American Center for Law and Justice failed to show that the FBI had a **pattern or practice** of refusing to respond to requests within the statutory time limit and then forcing requesters to file suit if they wanted to pursue their request. As the basis for its pattern and practice claim, ACLJ explained that it had requested records from the FBI in 2016 concerning an unscheduled meeting

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between then Attorney General Loretta Lynch and former President Bill Clinton at the Phoenix airport. Eight months later, as a result of a related suit against the Justice Department, ACLJ discovered the FBI had responsive records. The FBI eventually provided 29 redacted responsive pages. The other ACLJ FOIA request, submitted in 2017, asked for records concerning the agency's decision not to pursue criminal charges against Hillary Clinton. The FBI did not respond to that request until ACLJ filed suit. Addressing the pattern or practice claim, Contreras explained that there were three D.C. Circuit decisions recognizing a pattern or practice claim – *Payne Enterprises v. United States*, 837 F.2d 486 (D.C. Cir. 1988), *Newport Aeronautical Sales v. Dept of Air Force*, 684 F.3d 160 (D.C. Cir. 2012), and *Judicial Watch v. Dept of Homeland Security*, 895 F.3d 770 (D.C. Cir. 2018). In *Judicial Watch*, the D.C. Circuit recognized the possibility that a plaintiff could show that an agency had a pattern or practice of ignoring FOIA requests. Relying on *Judicial Watch*, ACLJ argued that the FBI had shown a pattern or practice of failing to take the statutory time limits seriously. But Contreras observed that "the Court is not convinced that these episodes allow the required inference. First, ACLJ's three prior examples each implicate requests of strikingly different subject matter and scope. . .This contrasts markedly with *Payne, Newport*, and *Judicial Watch*, each of which concerned repeated requests for a narrowly-defined class of documents. . .To be sure, the Circuit has never articulated a 'single subject' or 'single type of request' requirement for a policy-or-practice claim. But the similarity of the underlying requests is a factor courts take into consideration, as it suggests that the agency's behavior stems from a considered decision (for example, the applicability of a particular exemption to a particular category of documents) rather than isolated mistakes. And even in *Judicial Watch*, which arguably widened the standard for a policy-or-practice claim beyond *Payne* and *Newport*, the majority and concurrence both emphasized that the records all concerned the same subject matter." Continuing, Contreras pointed out that "the FBI's behavior across each of the three episodes was not uniform, and ACLJ's complaint does not consistently identify or describe the offensive practice." He added that "but here, particularly in light of the small sample size, the variation in the three cases cuts against an inference that the FBI is acting pursuant to an informal or formal policy, and, by definition, undermines the contention that the FBI us engaged in a persistent practice." He rejected ACLJ's contention that the FBI's constant failure to respond within the statutory time limit inferred a pattern or practice policy. Contreras disagreed, noting that "here, ACLJ's argument boils down to the contention that the FBI, like many agencies engaged in repeat litigation with regular FOIA litigants, has violated FOIA multiple times in different ways in response to three novel kinds of requests. To the Court's knowledge, an agency policy or practice has never been inferred from such a diversity of conduct." Contreras indicated that "ACLJ's most plausible argument rests on the idea that *Judicial Watch* makes persistent or prolonged delay itself actionable regardless of the kind of request or reason for the delay. . .However, notwithstanding some of its language, *Judicial Watch* did not rely on missed deadlines alone; rather it conducted a fact- and context-sensitive analysis that focused on the similar and straightforward nature of the requests and the sheer number of times they were ignored. . .And here, there is little, if anything, beyond the delays themselves that 'could signal the agency has a policy or practice of ignoring FOIA's requirements.'" Contreras concluded by recognizing an alternative remedy for such routine failure to respond on time. He observed that "the Court does not endorse or excuse the FBI's alleged noncompliance. But FOIA offers its own mechanism for disciplining an agency's unjustified conduct in individual cases: fee awards. This counsels against inferring a policy or practice from a small number of episodes." (*American Center for Law and Justice v. Federal Bureau of Investigation*, Civil Action No. 19-2643 (RC), U.S. District Court for the District of Columbia, July 2)

Judge Trevor McFadden has dismissed the Department of Health and Human Services' attempt to **consolidate** four of five FOIA suits brought against the agency by American Oversight after finding there is insufficient commonality between them to justify consolidation. While the suits all involved the impact of COVID-19 on the individual agencies, McFadden noted that one suit brought against the Centers for Disease Control alleging a pattern or practice of refusing to process reasonably described requests was unique. He

pointed out that "none of the other four cases involved a similar claim, so that is not a common factual or legal question. And since the scope of that case differs from the others, there is little risk that Judge Mehta's ruling there will conflict with rulings in the other cases." Another case had been brought against the Department of Treasury, Department of State, and the Centers for Medicare and Medicaid Services. For this suit, McFadden explained that "here, no countervailing factors strongly support consolidation. The scope of the requests is different." He agreed that another case assigned to Judge James Boasberg could be consolidated. He then commented on when cases might be ripe for consolidation. He noted that "a case with this posture could well present grounds for consolidation on slightly different facts. Indeed, the common plaintiff in each of these cases and the government agencies' preference for consolidation present an attractive argument for consolidation. More, concerns about judicial economy could justify consolidation in serial FOIA cases. But two concerns that may otherwise compel consolidation – an appearance of forum-shopping or a strong potential of inconsistent rulings on the same documents – do not seem to be present here. In the end, the differences between these cases counsel against consolidation." (*American Oversight v. U.S. Department of Health and Human Services, et al.*, Civil Action No. 20-00947 (TNM), U.S. District Court for the District of Columbia, June 25)

Judge Emmet Sullivan has ruled that the Bureau of Indian Affairs properly responded to a request from Lorry Van Chase for records concerning Chase generated by the Turtle Mountain Law Enforcement Agency. After the agency failed to respond on time, Van Chase filed suit. BIA initially claimed the records were protected by **Exemption 7(A) (interference with ongoing investigation or proceeding)** because of Van Chase's post-conviction appeal. However, after being satisfied that the post-conviction appeal was concluded, BIA processed the request and provided 26 pages with redactions made under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Because Van Chase did not challenge the agency's search or exemption claims, Sullivan granted the agency's motion for summary judgement. He pointed out that "with Plaintiff's concessions, and based on the Court's review of BIA's supporting declaration and Vaughn Index, there remains no material fact in genuine dispute regarding BIA's compliance with FOIA." Van Chase claimed he was entitled to **attorney's fees** since the agency had dropped its reliance on Exemption 7(A) and processed his request. But Sullivan noted that "technically, Plaintiff is correct that the post-conviction proceedings in his *federal* criminal case had not commenced when he submitted his FOIA request on September 4, 2018. However, BIA shows that there was pending post-conviction matter in state court when Plaintiff submitted his FOIA request. The Court accepts BIA's representation that the state matter 'overlapped with the Eighth Circuit post-conviction matter.' In the circumstances of this case, BIA reasonably could have taken the position that Exemption 7(A) applied because post-conviction proceedings in the federal and state courts were pending in 2018 and 2019." Sullivan observed that "without question, BIA's response to Plaintiff's FOIA request was untimely. But FOIA 'does not suggest that an award of attorney's fees should be automatic' in such circumstances. BIA no longer relies on Exemption 7(A) and Plaintiff concedes that BIA since has conducted a reasonable search and properly relied on Exemptions 6 and 7(C). Even if Plaintiff were eligible for an award of litigation costs, he fails to demonstrate that he is entitled to it." (*Lorry Van Chase v. Bureau of Indian Affairs, et al.*, Civil Action No. 18-2902 (EGS), U.S. District Court for the District of Columbia, June 26)

Judge James Boasberg has ruled the a number of the remaining FOIA requests filed by William Powell with the IRS seeking tax records on himself and Powell Printing, the family's Detroit-based printing company that had been started by Powell's grandfather and subsequently operated by his father and then Powell himself are blocked by **collateral estoppel** also referred to as **issue preclusion**. Collateral estoppel prevents a litigant from relitigating an issue that has already been decided in previous litigation between the parties. Powell tried

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to introduce new evidence showing that tax forms that a court had previously ruled had been destroyed would not have been destroyed before 2002. But Boasberg indicated that "his attempt to present this evidence after a final opinion has been rendered on the same issue, however, is exactly the kind of 'piecemeal litigation' that collateral estoppel is meant to prohibit. It bears noting that nothing in Powell's allegations suggests that he could not have obtained this evidence at the time of the prior suit." Even though Boasberg agreed that in one instance Powell had shown that he constructively **exhausted his administrative remedies.** However, since Boasberg then concluded that the agency had **conducted an adequate search**, the fact that Powell could proceed in court made no difference. Powell noted that "for purposes of this inquiry, it makes no difference whether Powell requested the various documents under FOIA or the Privacy Act. Indeed, our Circuit has held that the adequacy of the search for both FOIA and Privacy Act requests is analyzed under the same standard." (*William Powell v. Internal Revenue Service*, Civil Action No. 18-2675 (JEB), U.S. District Court for the District of Columbia, July 2)

A federal court in California has ruled that the IRS may submit an *in camera* affidavit to justify its exemption claims made in FOIA litigation against Billie Mertes. Mertes had requested a gift and generation-skipping transfer tax form used to assess gift taxes against Mertes in the 2012 tax year. The agency asked the court to allow it to provide an *in camera* affidavit. Mertes argued that the IRS had not submitted any case law permitting an *in camera* submission on such a broad range of documents. But the court agreed that the IRS had shown the need for providing such an *in camera* affidavit. The court noted that "given the IRS's representations in two motions that no further information can be provided publicly, the Court will permit the IRS to attempt to demonstrate that this is an 'exceptional case'. . .and to submit the requested document for *in camera* review. No other procedure is apparent that does not risk disclosure of information that could otherwise be lawfully withheld." (*Billie Mertes v. Internal Revenue Service*, Civil Action No. 19-1218 AWI SKO, U.S. District Court for the Eastern District of California, June 26)