Volume 46, Number 22
November 18, 2020

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

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

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ISSN 0364-7625.

Washington Focus: Now that Donald Trump has lost his bid for reelection, Washington Post national security reporter Shane Harris wrote an article concerning the possible misuse of classified information by Trump when he leaves office. Harris observed that "a President Biden could refuse to give Trump any intelligence briefings, which ex-presidents have received before meeting with foreign leaders or embarking on diplomatic missions at the current president's request." Harris quoted David Priess, the author of a book on top-secret intelligence briefings, noting that "I think that tradition ends with Trump. It's based on a courtesy and the idea that presidents may call on their predecessors for frank advice. I don't see Joe Biden calling up Trump to talk about intricate national security and intelligence issues. And I don't think Biden will send him anywhere as an emissary."

Court Finds Payroll Protection Data Not Exempt

Ruling in a consolidated case brought by the Washington Post and the Center for Public Integrity for records identifying companies that received loans as part of the Paycheck Protection Program, part of the March 2020 Coronavirus Aid, Relief, and Economic Security (CARES) Act, Judge James Boasberg has rejected the claims by the Small Business Administration that most identifying information is protected by Exemption 4 (confidential business information) or Exemption 6 (invasion of privacy). In so ruling, Boasberg provided some continued coloration further fleshing out the confidentiality requirements contained in *Food Market Institute v. Argus Leader Media*, 139 S. Ct 2356 (2019), as well as the still unclear parameters of when information related to the identity of companies may qualify for protection under Exemption 6. In this case, Boasberg found neither exemption applied.

When the government failed to provide much information about the specifics of the payouts, the *Post* and other media organizations filed FOIA requests. The media organizations, with the *Post* as their lead plaintiff, filed suit. CPI subsequently filed suit as well. That action prompted the SBA to release some information. However, Boasberg pointed out that "the data contained glaring gaps: the agency did not

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provide *both* dollar figures *and* borrower names and addresses for any of the PPP loans, but rather withheld the precise amounts of all loans of $150,000 or more, as well as recipients' identities for loan figures under that figure." He explained that "SBA adopted an 'either/or' approach: for loans of $150,000 or more, it released the recipient's name and address, but withheld the actual loan amount and instead provided 'loan amount ranges' of $150,000 to $350,000; $350,000 to $1 million; $1 million to $2 million; $2 million to $5 million; and $5 million to $10 million. For loans of less than $150,000, on the other hand, the agency released the precise dollar amounts, but withheld the borrower's name and street address." The agency told the requesters that the withheld data was protected by Exemption 4 and Exemption 6.

Reviewing the Exemption 4 claims, Boasberg began by first addressing the impact of *Food Marketing Institute*, particularly its requirements for finding that business-related records had been submitted to the government in confidence. In *Food Marketing Institute*, the Supreme rejected the substantial competitive harm test originally established by the D.C. Circuit in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as being contrary to the plain language of Exemption 4. Instead, the Court opted for a customarily confidential standard as the basis for assessing Exemption 4 claims. In determining whether information was provided in confidence, the Court declined to address whether clear promises of confidentiality were required but explained that "where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4."

Boasberg noted that "after *Food Marketing*, it is an open question in this Circuit whether government assurance that information will remain private is necessary for such information to qualify as 'confidential' under Exemption 4. Regardless of whether such an additional condition is required in every case, it is clear that the government *must* show that the commercial or financial information is 'both customary and actually treated as private' in order to withhold it." Applying that standard here, he noted that the SBA "*still* may not withhold the loan data under the [confidentiality] prong, as disclosure would not reveal any information 'that has "customarily" and "actually" been treated as private.' And because SBA flunks this requirement, the Court need not tackle the question left open after *Food Marketing* – namely, whether the government must also establish that it provided assurances that the information will remain private."

The crux of the SBA's argument was not that the loan data was per se confidential, but that disclosure of more details would allow others to determine the payroll of businesses, which was clearly customarily confidential. Boasberg faulted the SBA's assumption that businesses applying for loans would always ask for the maximum amount allowed, and that data could be used to calculate their payrolls. Instead, he noted that "without knowledge of whether a borrower sought and received the maximum possible loan and pays its employees more than $100,000 annually (and, if so, how many and by how much) third parties are in the dark about payroll." He indicated that "the government 'bears the burden of proving the applicability of any statutory exemption it asserts in denying a FOIA request' and it must furnish 'detailed and specific information' to justify its withholding. SBA has not met that obligation here. As a result, even assuming that a business's payroll qualifies as 'confidential' under Exemption 4, the agency may not withhold borrowers' names, addresses, and loan amounts pursuant to such provision and disclosure would not reveal any commercial information that is 'customarily and actually treated as private.'"

The SBA fared no better on the Exemption 6 claim, where the agency focused on caselaw finding that identifying data on small family-owned businesses could be protected. Instead, Boasberg pointed to cases like *Alliance for Wild Rockies v. Dept of Interior*, 53 F. Supp. 2d 32 (D.D.C. 1999) and *Prechtel v. FCC*, 330 F. Supp. 3d 320 (D.D.C. 2018), in which the courts concluded that individuals who made public comments in rulemaking procedures had no expectation of privacy. Boasberg pointed out that "the import of these cases for

the present one is evident: where SBA explicitly and unambiguously told loan applicants that their names and approval loan amounts would not remain private, such notification substantially 'mitigates' any individual privacy interest in the withheld information." The agency argued that the loan disclosure requirements only applied to another type of loan. However, Boasberg rejected that claim, noting that "the Court finds that the far more 'natural' reading' is also the far simpler one: the application's promise of name and loan amount disclosure means what it says."

Boasberg found the public interest in disclosure was clear. He pointed out that "in light of SBA's awesome statutory responsibility to administer the federal government's effort at keeping the nation's small businesses afloat amidst an economic and health crisis of unprecedented proportions, the public interest in learning how well the agency fulfilled its charge is particularly pronounced." He further observed that "even more critical – and particularly relevant to the substantial public interest at hand – are the well-documented allegations of fraud related to the disbursement and receipt of CARES Act funds." He added that "without the information withheld under Exemption 6, 'the public would have great difficulty' determining whether SBA has fairly and equitably apportioned a staggering sum of taxpayer money to the smallest of businesses, in a fashion that minimizes the potential for fraud. That reality reflects a powerful public interest in disclosure." (*WP Company LLC, et al. v. U.S. Small Business Administration*, Civil Action No. 20-1240 (JEB) and *Center for Public Integrity v. U.S. Small Business Administration*, Civil Action No. 20-1614 (JEB), U.S. District Court for the District of Columbia, Nov. 5)

Views from the States

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

Maryland

The Court of Special Appeals has ruled that the Baltimore Police Department properly responded to a request from Randall Martin the agency's standard procedure protocols for 911 emergency calls. In response to his request, the police department provided two responsive documents – General Order G-1 and the department's amendment to General Order G-1. Martin then filed suit, explaining to the police that he was not interested in obtaining identifying information about individual 911 calls but only wanted the standard operating procedures for responding to such calls. The police department filed a motion to dismiss Martin's suit, arguing he had not claimed that any records were denied. The trial court ruled in favor of the police department. The appeals court agreed with the trial court's conclusion. The appeals court noted that "on appeal, Mr. Martin contends that 'the information produced by the Baltimore Police Department has no relevance to the request for 911 Emergency Calls.' We do not discern that the [trial] court abused its discretion in denying Mr. Martin's motion for reconsideration on these grounds because these arguments did not and do not address the sufficiency of Mr. Martin's complaint, which was squarely at issue in the Department motion to dismiss." The appeals court added that "Mr. Martin's petition for judicial review did not set forth with sufficient particularity that Department's record production was nonresponsive to his [Maryland Public Information Act] request, nor did it clarify which documents he specifically sought from the Department. His petition did not specifically allege the Department's response was deficient because the records produced did not mention the word 911. This contention was raised for the first time in Mr. Martin's motion for reconsideration." (*Randall Martin v. Baltimore Police Department*, No. 1671, Sept. Term, 2019, Maryland Court of Special Appeals, Nov. 16)

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The Federal Courts…

A federal court in New York has ruled that the Department of Defense did not **waive Exemption 1 (national security)** by publicly acknowledging records about the January 29, 2017 military operation carried out in al Ghayil, Yemen in response to a request from the ACLU. In his earlier January 2020 decision, Judge Paul Engelmayer had resolved the issues in dispute except for two documents the ACLU contended might have been publicly acknowledged. After reviewing those documents *in camera*, Engelmayer sided with the agency. He pointed out that under *Wilson v. CIA*, 586 F. 3d 171 (2nd Cir. 2009), the Second Circuit precedent on what constituted an official acknowledgment, the disclosed information had to be as specific as the information previously disclosed, match the information previously disclosed, and that disclosure was made through an official and documented disclosure. Applying the *Wilson* test here, Engelmayer pointed out that "the Court finds the redacted information in [the two disputed documents] does not match, and is clearly more specific than, any information previously disclosed by the Government. The redacted material indeed contains 'details regarding the parameters of the mission, the time span of the approval, and other operational information,' as described by the Government. And that material does not 'present the same information about the same subject' as any prior government disclose the ACLU has identified. The revelation of the redacted portions of these records would thus necessarily reveal information that has not been officially acknowledged, and this in turn may cause harm to U.S. national security or foreign relations." (*American Civil Liberties Union v. Dept of Defense, et al.*, Civil Action No. 17-3391 (PAE), U.S. District Court for the Southern District of New York, Nov. 12)

A federal court in New York has ruled that the Federal Reserve **conducted an adequate search** for records concerning three Maiden Lane LLCs, created during the 2008 financial debacle and closed in 2012. Daniel Junk requested the records, identifying them with a Committee on Unform Security Identification Procedures (CUSIP) number. The Federal Reserve told Junk that it would not conduct a search because they were not agency records of the Federal Reserve but of the Federal Reserve Bank of New York. Junk appealed the agency records decision to the Second Circuit. While the case was pending before the Second Circuit, the Federal Reserve asked the FRBNY to conduct a search for the records requested by Junk. That search yielded no records. The Second Circuit remanded the case back to the district court to assess the adequacy of the agency's search. Judge Denise Cote found that the Federal Reserve had now shown that it conducted an adequate search through the search conducted by FRBNY. Junk argued that the search was insufficient because FRBNY had reviewed only three spreadsheets. However, Cote noted that "the FRBNY made reasonable decisions about what record systems were likely to contain documents responsive to Junk's request. Junk's request identified the records associated with one of the Maiden Lane entities and included a CUSIP number. The appropriate records custodian identified the spreadsheets as the documents that contained all CUSIP numbers for transactions associated with Maiden Lane entities and personally conducted the search. The size of the Maiden Lane loans does not render those decisions unreasonable or indicate that the search was inadequate." (*Daniel L. Junk v. Board of Governors of the Federal Reserve System*, Civil Action No. 19-385 (DLC), U.S. District Court for the Southern District of New York, Nov. 18)

Judge John Bates has ruled that the Department of the Army **conducted an adequate search** for records requested by Nancy Swick, who worked as an OB/GYN nurse practitioner at Fort Belvoir Community Hospital from 2011 to 2013. Swick requested records concerning a psychiatric evaluation she was apparently ordered to undergo while employed at FBCH and further, all personnel records or any records mentioning her.

The agency denied both requests and Swick filed suit. The agency contended that it could not search for her medical records because of HIPAA regulations and that her personnel file should have been sent to the National Personnel Records Center. In his first ruling in the case, Bates found that HIPAA did not prohibit the agency from searching for records pertaining to Swick. Further, while he agreed that physical control of Swick's personnel records was now with NPRC, the agency had failed to show that it no longer had electronic access to her personnel records. This time, Bates agreed that the agency had adequately searched for any psychiatric evaluation of Swick and, as a result, had found no records. Swick argued that the agency might have inappropriately searched for her discipline – OB/GYN nurse – and combined that with a suggestion that her specialty was in psychiatry, which it was not. But Bates found this argument a bit much. Instead, he noted that "that interpretation is unfounded. Not every hospital patient is a health professional, like Swick, with a medial 'discipline;' rather, as the Army clarifies in its briefing, in the context of an electronic health records database, the term 'discipline' naturally refers to that of the attending physician, not the patient." However, Bates found that the agency failed to show that it no longer had electronic access to her personnel files. He noted that "because the Army provides no evidence that Swick's files were 'accepted by NPRC' or that the 'NPRC has approved the transfer,' this argument does not further [the agency's] case or resolve the Court's inquiries." (*Nancy J. Swick v. United States Department of the Army*, Civil Action No. 18-1658 (JDB), U.S. District Court for the District of Columbia, Nov. 9)

The Ninth Circuit has ruled that the trial court properly dismissed a number of suits filed by Smart-Tek Services against the IRS for information about the payroll tax delinquency of companies the agency contended were nothing but alter-egos for Smart-Tek Services. In response to Smart-Tek Service's suits, the trial court determined that the company was entitled to its own tax return information but not that of the alter ego companies. At the Ninth Circuit, Smart-Tek Services argued that the agencies had not **conducted an adequate search**. The Ninth Circuit explained that Smart-Tek Services "argue that the IRS improperly withheld documents containing information about their alleged alter egos. They argue that once the IRS collected the records of the Companies and their alleged alter egos and commingled them into one file, *everything* in that file became part of the Companies' administrative files to which they were entitled. Thus, the Companies argue, it was improper for the IRS to withhold records containing their alleged alter egos' return information merely because those records did not contain the Companies' return information." The Ninth Circuit rejected that claim, noting that "the Companies' argument misses the simple point: they did not request this information in their FOIA requests." The Ninth Circuit added that "each of the Companies submitted a request for *its own* employment, corporate, and partnership tax returns and listed only *its own* specific entity's name and taxpayer identification number; none of the Companies listed the names or taxpayer identification numbers of their alleged alter egos. Because the Companies seek documents that are outside the scope of their FOIA requests, the Companies are not entitled to those documents through this particular process." (*Smart-Tek Services, Inc., et al. v. United States Internal Revenue Service*, No. 18-56560, et. al, U.S. Court of Appeals for the Ninth Circuit, Nov. 5)

A federal court in Tennessee has ruled that Anton Thompson failed to show that he had properly **served** the National Security Agency and two of its employees when he filed a FOIA suit against the agency for records he alleged showed that the agency was subjecting him to electronic torture and mind control. Thompson served the agency and the two identified employees by certified mail to the National Security Agency at Fort Meade, Maryland. Ruling in favor of the government, the court indicated that "none of the defendants in this action has been properly served in accordance with Rule 4." The court pointed out that "the docket in this case contains no evidence that Thompson has served a copy of the summons and complaint on the U.S. Attorney for the Middle District of Tennessee or the Attorney General of the United States." The

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court added that "while Thompson filed certificates of service addressed to [three individuals at the NSA], it appears that none of these individuals is authorized to accept process on behalf of the NSA; nor do [two of the individuals] appear to be authorized to accept service for suits brought against them in their official capacities." (*Anton Thompson v. National Security Agency, et al.*, Civil Action No. 20-00467, U.S. District Court for the Middle District of Tennessee, Nashville Division, Nov. 6)