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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

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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)

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