PRIVACY TIMES

EDITOR: EVAN HENDRICKS

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*CAPITAL INSIGHTS: The International Association of Privacy Officers (IAPO) is seeking a part-time executive director. Duties include management and fundraising. Deadline is August 12. Contact: Melissa Horowitz, IAPO, 1211 Locust Street, Philadelphia, PA, 19107, fax (215) 545-8107; info@privacyassociation.org. . . . Also in Philadelphia, the Albert Einstein Healthcare Network is looking for a Chief Privacy Officer. Contact: Brookss@einstein.edu Fax: 215-951-8595. . . Alan Westin's Privacy & American Business has launched a posting service for privacy jobs, www.pjobs.org. . . . The Pentagon will introduce rules next month that limit the use of **wireless devices inside military buildings**, the AP reported. Officials are concerned that the devices are not secure, and that they could be used to eavesdrop on or track the location of military personnel. The new rules place restrictions on the use of cell phones, pagers, and hand-held computers by civilian and military personnel.*

MAJOR STORIES IN THIS ISSUE

FOIA EXEMPTIONS FOR PRIVACY, ONGOING PROBES DON'T APPLY

Stating that "secret arrests are a concept odious to a democratic society," a federal judge in Washington has ordered the Justice Dept. (DOJ) to release the names of at least 751 foreigners who were arrested on immigration violations as part of the post-Sept. 11 terrorist investigation. DOJ is expected to appeal the ruling.

U.S. District Judge Gladys Kessler rejected government efforts to withhold the detainees' names under FOIA Exemption 7(A), which protects ongoing investigations. DOJ argued that

disclosure would reveal the scope of the government's investigation and help terrorists discover which of their colleagues were being held.

The problem with the government's argument, she said, was that "it assumes terrorist groups do not already know that their cell members have been detained."

"Detainees are entitled to inform whomever they want of their detention," Judge Kessler continued. "Given this option of 'self-disclosure,' and given that more than 10 months have passed since September 11, it is implausible that terrorist groups would not have figured out whether their members have been detained. [DOJ] has offered no reason to believe that terrorist groups would not know of the detentions. Second, the Government's rationale is contradicted by its own extensive disclosures. The Government has released the names of individuals it has identified as members of al Qaeda or connected to that organization. Moreover, at least 26 individuals held on material witness warrants have been publicly identified, and the identities of others held on immigration charges have been disclosed, some reportedly by the Government. The Government does not explain why its concerns about cooperation apply with respect to some detainees, but not to other detainees whose identities have been disclosed."

"Third, the Government has not met its burden of establishing a 'rational link' between the harms alleged and disclosure. Obviously, the release of names would not deter cooperation or prevent detainees from providing valuable information to the Government unless those detained actually had some pre-existing link to or knowledge of terrorist activity," she continued.

"The Government affidavits assume, but utterly fail to demonstrate, the existence of this link. The affidavits nowhere declare that some or all of the detainees have connections to terrorism. Nor do they provide facts that would permit the Court to infer links to terrorism. For example, the Government has provided no information on the standard used to arrest and detain individuals initially. Nor has it provided a general description of evidence that it obtained confirming any initial suspicions of links to terrorism. Indeed, when asked by the Court during the Motions Hearing to explain the standard used to arrest the detainees, or otherwise to substantiate the purported connection to terrorism, the Government was unable to answer."

"Indeed, the Government's rationale that disclosure would deter the INS detainees from cooperating is also not supported by the case law. Nearly every relevant Exemption 7(A) case has involved actual witnesses or informants in an ongoing or "concrete prospective law enforcement proceeding," she wrote in a footnote.

The requests were filed in October 2001 by several groups, including the Center For National Security Studies, the ACLU and the American-Arab Anti-Discrimination Committee. Filed simultaneously with the FBI, Immigration & Naturalization Service and DOJ's Office of Information and Privacy, the request were granted expedited processing a month later.

Attorney General John Ashcroft repeatedly has defended DOJ's refusal to release names, citing the privacy of detainees. But Judge Kessler said DOJ could ensure confidentiality by asking detainees if any wanted their name excluded from the list that was to be disclosed.

Citing the need to balance privacy against the public interest in disclosure, she wrote, "Exemption 7(C) does not provide blanket protection to all information that could invade personal privacy. Indeed, if privacy concerns alone were sufficient, the Government could arrest and jail any person accused of a heinous crime and refuse to reveal his or her name to the public.

OREGON JURY, D.C. CIRCUIT CONTINUE TRANS UNION'S LOSING STREAK

It was a tough couple of weeks for Trans Union, one of the nation's "Big Three" credit bureaus. First, it lost another challenge to the Federal Trade Commission's rules restricting its sale of credit header data under the Gramm-Leach-Bliley Act.

Then, on July 29, a federal jury in Oregon awarded $5.3 million to Judy Thomas, a Klamath Falls woman whose Trans Union credit report was regularly mixed with Judith Upton, a Washington State resident. Upton's Social Security number was only one digit different than Thomas' SSN. That, combined with three common letters in the first name, was sufficient to cause a regular merging of the two women's credit histories. Thomas repeatedly was frustrated in her efforts to get Upton's data off of her credit report. .

It was the biggest award ever under the Fair Credit Reporting Act; $300,000 was in compensatory damages; $5 million was in punitive damages, intended to punish the Chicago-based credit bureau for willfully violating the FCRA.

Trans Union assuredly will appeal the verdict. The largest award previously, $4.4 million against Trans Union, came from a federal jury in Mississippi in 1998. But the verdict was vacated by a three-member panel of the U.S. Court of Appeals for the Fifth Circuit, which ruled that a willful violation of the FCRA required some form of concealment. Other courts have concluded that a willful violation requires either reckless or conscious disregard of the law. The Magistrate Judge in the Oregon case, John Jelderks, adopted the conscious disregard standard in his instructions to the jury.

A key moment in the trial came when one of Thomas' lawyers, Robert Sola, cross-examined Joni Payabyab, the TU manager of consumer disputes. Payabyab testified that TU dispute handlers received training on the FCRA and had to take an exam. But when Sola read to her certain provisions of the FCRA, including ones from the 1996 amendments, Payabyab appeared unfamiliar with them. When asked directly by Sola, she effectively admitted that she was unfamiliar with them.

Sola's litigation partner was Michael Baxter, the lead attorney in the ***Jorgensen*** case, which resulted in a $600,000 verdict against TRW. That verdict is the largest FCRA award not to be reduced or vacated. TU was represented by Donald Bradley of Crowell and Moring. (Editor's Note: Evan Hendricks was an expert witness for the plaintiff.)

Back in Washington, the D.C. Circuit's July 16 opinion upheld broad FTC rules effectively barring Trans Union from selling credit header data -- personal information on the top

of the credit report like name, address and Social Security number. The appeals panel concluded that the FTC had broad authority to define such key terms as "financial institution" and "financial information" under the Gramm-Leach-Bliley Act, and that the FTC was entitled to deference.

The FTC rules defined financial information as any data provided by an individual in order to get a financial service. The D.C. Circuit rejected TU's claim that the rules interfered with its First Amendment right of commercial free speech. (***TU v. FTC***: CA-D.C. -- No. 01-5202; July 16) (http://pacer.cadc.uscourts.gov/common/opinions/200207/01-5202a.txt.)

The decision was somewhat of a replay of the D.C. Circuit's opinion in ***Trans Union I***, in which it upheld an FTC enforcement action under the FCRA to stop TU from selling credit report data for non-credit marketing. In June, the U.S. Supreme Court rejected TU's bid to overturn that decision. (see *Privacy Times*, June 12; Vol. 22 No. 12)

FACA, APA LAWSUIT AGAINST CHENEY ENERGY PANEL TO PROCEED, CT. RULES

A federal judge in Washington has declined to dismiss major elements of an open government lawsuit against Vice President Richard Cheney's energy task force, finding there was sufficient evidence that the group was subject to the Federal Advisory Committee Act (FACA).

Citing the public's right to government information, U.S. District Judge Emmet Sullivan said the suit should go forward to determine if Cheney's National Energy Policy Development Group (NEPDG) must open its records because it violated the FACA.

"Both [Judicial Watch] and [Sierra Club] have properly alleged that the government failed to make documents available during the life of the NEPDG. Whether or not plaintiffs sued after the group terminated does not alter the allegation that the government failed to meet the substantive requirements of the statute during the relevant timeframe," he wrote.

The government argued that only the Freedom of Information Act, and not FACA, governed public access to agency records.

"In the absence of a FACA violation, this may be an accurate statement," Judge Sullivan responded. "If the government complies with FACA, and provides documents in a reading room until the committee ceases to exist, and a citizen wants to access those documents at some time after the termination of the committee, that citizen would have to file a FOIA request to a proper agency defendant for those documents. But the scenario is not what plaintiffs have alleged. When the government violates FACA, the question is not what other statutes could also provide a right of access, but what options are available to this Court to remedy that statutory violation."

On the other hand, Judge Sullivan dismissed charges against the individual defendants, including Republican Party Chairman Haley Barbour, Enron's Kenneth Lay and Mark Racicot. The FACA did not create a private cause of action, he ruled. He also dismissed the FOIA suit

against Cheney because the Vice President was not an "agency." (***Judicial Watch, Inc. v. NEPDG***; ***Sierra Club v. V.P. Cheney, et al***: USDC-D.C. -- Nos. 01-1530 & 02-631; July 11.)

FOIA CT. ROUNDUP: EXTENSION NOTICES; EX. 5 & DOI; EXHAUSTING ADMIN. REMEDIES

The following is a summary of recent court decisions under the Freedom of Information Act.
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Public Citizen, Inc. v. Dept. of Education & Dept. of State: (No. 00-1390)
Court: U.S. District Court for the District of Columbia
Judge: Ellen Segal Huvelle
Exemptions: FOIA (b)(6)
Documents: Student loan recipients who were improperly denied discharges
Issue: Must agency always send notice when it fails to comply with time limits?
Date: July 9, 2002

In a split decision, the court ruled that federal agencies are not required to send notices to requesters whenever they are unable to comply with the 20-day time limit. On the other hand, it ruled that the identities of recipients of illegal student loans were not protected by Exemption 6.

Public Citizen argued that such notices were mandatory under FOIA Section (a)(6)(B), which allows agencies to seek extension of the time limits when there are "unusual circumstances." In such cases, the section states that agencies "shall" send notice to the requester of the delay and offer the requester the opportunity to limit the scope of the request or otherwise negotiate to expedite disclosure.

However, Judge Huvelle, noting the Section's language that time limits "may" be extended, agreed with the government that the decision to invoke the extension, and therefore the accompanying notice, was at the agency's discretion.

"The plain language of the [FOIA] makes clear that providing such notice and seeking an extension under Subsection (a)(6)(B)(i) is discretionary, for the statute limits the circumstances when a 10-day extension is possible to certain delineated circumstances, and as to those circumstances, the agency 'may,' but is not required to, invoke an extension," she wrote.

"Congress enumerated only three instances that are sufficiently 'unusual' to justify such extensions. However, under [Public Citizens'] interpretation, the definition of 'unusual circumstances' would be rendered meaningless, for an agency would be required to seek an extension in all cases where it did not comply within the 20-day deadline," she continued.

The case involved records pertaining to individuals who were eligible to have their student loans forgiven because they were defrauded by so-called vocational schools that were unable to deliver real training. In 1992, Congress passed a law requiring the Dept. of Education to discharge loans that were "falsely certified." However, the Education Dept. adopted

procedures making it difficult for eligible students to get their loans discharged. In 1999, a federal court rule the procedures were illegal. Public Citizen sought records on students who had been improperly denied loan discharges between 1992 and 2000.

Judge Huvelle held that the individuals' interest in recovering money owed to them outweighed the threat to their privacy. She cited the D.C. Circuit's 1999 opinion in ***Lepelletier v. FDIC*** (164 F.3d 37) in which the court ruled that the FDIC must disclose to a money finder the identities of people with unclaimed deposits.

"This Circuit noted: 'It is overly paternalistic to insist upon protecting an individual's privacy interest when there is good reason to believe that he or she would rather have both the publicity and the money than have neither," she wrote, quoting from ***Lepelletier***.

"Here plaintiff has presented an even more compelling argument in favor of disclosure than Lepelletier did. . . . The borrowers would directly benefit from disclosure of information revealing that they were negatively impacted by unlawful DOE regulations, because any borrower who ultimately is able to receive a discharge could have the money refunded or have debts owed to the government cancelled. Importantly, discharge could also result in a borrower having his or her eligibility for federal educational assistance restored and any adverse credit history could be expunged from credit reports," she wrote.

"Furthermore, many borrowers are likely unaware that they were improperly denied discharges – a factor that this Circuit found meaningful in ***Lepelletier*** . The Education Dept. has heretofore made no efforts to identify or contact the affected group of borrowers, even though it has the capability of doing so based on information in its possession," she wrote.

Judge Huvelle rejected the government's claim that disclosure would reveal "highly personal" and "embarrassing" data about individuals' financial situation and education level. The government also argued that a credit bureau might use the information to forecast candidates for bankruptcy.

"[The Government] has overstated the extent of any invasion of privacy given the lack of stigma associated with this particular information," she responded. "This information says nothing about their current level of education, nor does it reveal whether the individuals possess certain skill levels, because the false certification regulations applied in circumstances when schools had improperly certified individuals without administering tests, as well as when schools had certified individuals unable to pass tests." Judge Huvelle said the information does not indicate that these individuals would be more likely to file bankruptcy

State of Maine v. U.S. Dept. of Interior, U.S. Fish & Wildlife Service, et al.: (No. 01-1234)
Court: U.S. Court of Appeals for the First Circuit
Judge: Rosenn, Selya & Cyr
Exemptions: FOIA (b)(5)
Documents: Fish & Wildlife decision on protecting Atlantic Salmon
Issue: Exemption 5 standard for attorney work product
Date: July 30, 2002 (Story Continued On Page 7)

Despite a slight softening of its standard, the appeals panel nonetheless ordered the. disclosure of records that the Interior Dept. claimed were either attorney-client communications or attorney work product. Some experts had predicted the government might ask the U.S. Supreme Court to review the case.

In rejecting the Fish and Wildlife Service's assertion of Exemption 5, the appeals panel essentially affirmed a district court order that the Service release documents pertaining to its decision to protect some Atlantic Salmon as endangered species. However, the appeals court vacated the district court's finding that Exemption 5 only covered attorney work product prepared "primarily for" litigation.

The appeals panel agreed with the government that Exemption 5 protects records that were created " because of" litigation, a standard adopted by several other Circuits. But this was insufficient by itself to justify withholding because the Interior Dept. (DOI) failed to correlate the documents listed in a Vaughn index to lawsuits cited in an accompanying affidavit, it said.

"DOI reasoned that because there already have been three lawsuits directly related to the listing, it is reasonable for the attorneys advising the department to anticipate more litigation at various stages in the process," Judge Rosenn wrote.

The district court found that factual material in a privileged attorney work product document was not protected by Exemption 5. But plaintiff State of Maine mooted the point by withdrawing its request for 19 documents covered by the ruling, as well as those subject to an in camera review. The appeals court therefore vacated the district court's finding.

The appeals panel also affirmed the district court's order to disclose attorney-client communications. "The DOI erroneously assumes that the requirement of client communicated confidentiality is satisfied merely because the documents are communications between a client and attorney. The error in this assumption can be found by referring to ***Mead Data Central, Inc.*** (566 F.2d at 253) where the court held that the attorney-client privilege 'does not allow the withholding of documents simply because they are the product of an attorney-client relationship. *It must also be demonstrated that the information is confidential,*'" Judge Rosenn wrote.

"Like the district court here, the D.C. Circuit in Mead found certain documents unprotected by the attorney-client privilege because the agency failed to demonstrate the confidentiality of the data on which they are based. The court found that the withholding party simply failed to demonstrate that the withheld documents contain or relate to data that the client intended to keep confidential and it thus failed to establish an essential element of the privilege."

Judicial Watch v. FBI: (No 01-1216)
Court: U.S. District Court for the District of Columbia
Judge: Reggie B. Walton
Documents: Oklahoma City bombing an, plaintiff's grandfather
Exemptions: FOIA (b) (7)(A)
Issue: Exhaustion of administrative remedies is separate from expedite review
Date: June 26, 2002 (*Story Continued On Page 7*)

In a somewhat technical ruling, the court held that FOIA plaintiff must still file administrative appeals for the documents they seek, even if they sue over the agency's refusal to grant expedited processing.

"The only claim that {Judicial Watch] was entitled to file on was a request for judicial review of the FBI's failure to timely respond to the plaintiff's request for expedited processing," wrote Judge Reggie B. Walton. He ruled that the FOIA provision on expedited processing was "distinct" from the general requirement that requesters exhaust their administrative remedies.

He said that Judicial Watch was attempting to "bootstrap" its disclosure request onto its bid for expedited processing. "Although it appears that the FBI subsequently failed to timely respond to [Judicial Watch's] substantive request for documents within 20 business days, the Court will only consider those facts and circumstances that existed at the time of the filing of the complaint, and not subsequent events." he wrote.

The request sought documents on the Oklahoma City bombing which resulted in convictions of Timothy McVeigh and Terry Nichols. The FBI granted expedited processing, but withheld relevant information under Exemption 7(A), which protects ongoing investigations.

IN OTHER CASES:

The U.S. Court of Appeals for the Eighth Circuit ruled that a federal employee's staffing of a State government corporation did not make the organization's records subject to FOIA. The ruling blunted an effort by the State of Missouri to obtain documents from the Missouri River Natural Resources Committee (MRNRC). The group was staffed by Fish and Wildlife Service employee Mike LeValley, who kept the MRNRC's records in a separate filing system. The Service did not create, obtain or control the MRNRC's documents, the court ruled. The decision affirmed a district court. The fact that the U.S. Army Corps of Engineers incorporated the MRNRC's recommendations did not make them agency records, it ruled. The decision was written by Judge McMillian, who was joined by Judges Arnold and Riley. (***State of Missouri, et al. v. U.S. Dept. of Interior***: CA-8 – No. 01-3002; July 22.)

The U.S. Court of Appeals for the Tenth Circuit ruled that a Exemption 4-trade secret protection still applied to a 1936 antique F-45 aircraft made by Fairchild Engine and Airplane Corp. The plaintiff had sought the information so he could restore his own F-45. The papers were originally submitted to the Civil Aeronautics Agency (CAA), which was later taken over by the Federal Aviation Administration. The airplane manufacturer's successor, The Fairchild Corp., continued to claim trade secret status. The plaintiff argued that Fairchild had donated the papers to the Smithsonian and was no longer " owner" of the airplane. "Ownership of the type certificate, which grants permission to manufacture the aircraft in question, is not the issue. Rather, the issue is ownership of the documents and materials submitted as part of the application for that (CAA) certificate. Thus, the FAA may show that The Fairchild Corp. owns the documents by showing a corporate 'chain-of-ownership' of the documents from Fairchild, the original owner and submitter of the documents," wrote Judge Lucero, who was joined by

Judges Brorby and Seymour. (***Greg Herrick v. Jane Garvey, Admin. FAA, et al.***: CA-10 – No. 01-8011; July 24.)

Judge Paul Friedman ruled that the Justice Dept.'s satisfied him that its search was adequate after it described the key words it used to search its electronic databases. Plaintiff Judicial Watch argued that it was "incredulous" that DOJ was unable to find any responsive documents. It cited Judge Royce Lamberth's admonitions of the government in other cases. But Judge Friedman said those admonitions had no bearing on this case. (***Judicial Watch, Inc. v. U.S. Dept. of Justice***: USDC-D.C. 99-1234; July 31.)

Judge James Whittemore awarded plaintiff nearly $50,000 in fees and costs for its work in obtaining documents on Asst. U.S. Attorney Karen Cox, who was suspended from practicing law by the Florida Supreme Court for her conduct in the so-called **Sterba** case. The plaintiff was a Florida State agency charged with representing death row inmates, in this case, Michael Mordenti. However, Judge Whittemore stayed his final disclosure order for 60 days so the government could consider one last appeal. (***Office of Capital Collateral Counsel, et al. v. U.S. Dept. of Justice***: USDC-M.D. Florida (Tampa) -- No. 8:00-CV-1793-T-27TGW; June 23.)

Judge Janet Bond Arterton ruled awarded $4,950 in attorney's fees to Vincent Tarullo. In a footnote, she described how her refusal to grant the government's motion for summary judgment resulted in a second search that located responsive documents. Citing the Supreme Court's recent ruling in Buckhannon, holding a party did not prevail for purpose of attorney's fees unless they won some sort of relief from the court, Judge Arterton said her denial of the government's summary judgment motion could be construed as a judicial order. (***Vincent Tarullo v. U.S. Dept. of Defense***: USDC-Connecticut -- No. 3:00 CV 2462; July 11.)

Judge Vance ruled that the Postal Reorganization Act qualified as a FOIA Exemption 3 statute, finding that it protected certain information from job applications. "The Postal Service's application process would be compromised as a result because certain applicants would have an unfair advantage over others, and the agency would not have access to reliable information," Judge Vance wrote. (***Jerry L. Robinett v. U.S. Postal Service***: USDC-E.D. Louisiana -- No. 02-1094; July 24.)

Judge Ellen Segal Huvelle ruled that documents created pursuant to a Congressional inquiry and forwarded to the Joint Committee on Taxation were congressional, and not "agency" records, subject to FOIA. Although the IRS retained a copy of the record in a separate file, the record was controlled by Congress, she concluded. (***United We Stand and Russell Verney v. IRS***: USDC-D.C. -- No. 01-0735; June 27.)

A woman named Jo Ann Fonzone who claimed she was CEO of the MTV Group of Viacom, and who actually had visited the IRS's Bethlehem, Penn. office to complain about processing delays, was warned about filing further FOIA lawsuits by Judge Van Antwerpen. "We note first that plaintiff has presented no evidence that she is, in fact, the same Judy McGrath who runs MTV. . . Furthermore, (Plaintiff0 Jo Ann Fonzone had several prior actions dismissed by the Eastern District, including one which former Chief Judge Edward Cahn called 'frivolous on its face.' We will not assess fees and costs against [Fonzone] in this instance, though we

consider the present action borderline frivolous. However, we will recommend on the record that any frivolous lawsuit brought by Fonzone in the future be dismissed with both sides' fees and costs assessed against her." (***Jo Ann Fonzone v. Dept. of Treasury, IRS***: USDC-E.D. Penn. -- No. 02-CV-173; July 9.)

IN BRIEF . . .

South Carolina's 10 federal judges have agreed to stop sealing court-sanctioned settlements, the Associated Press reported. The new rule is set to take effect in the fall. Proponents hope it will increase public awareness of faulty products and other potential dangers, such as medical malpractice and Roman Catholic priests accused of child molestation. The judges voted unanimously last week to take the action. Opponents say the openness could hamper the quick settlement of potentially long and complicated cases. Secrecy can protect people who bring suits as well as the reputation of defendants, said Mills Gallivan, a Greenville attorney and president of the state Defense Trial Attorneys Association. Gallivan said he would like to see federal judges keep the discretion they now have to seal settlements. A rule in Michigan unseals secret settlements after two years, but no other federal court district has taken such a step, said Mary Squiers, a legal consultant who works with a national rule-making committee for federal courts. "It's going to change the dynamic of settlements," Squiers said.

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evan@privacytimes.com — www.privacytimes.com