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Natnael Moges

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BIG BROTHER HAS BIG SHOULDERS: DEFINING PRIVACY IN THE FACE OF E-DISCOVERY EXPANSION AND FOIA REFORM

by NATNAEL MOGES

PRIVACY AND DISCOVERY CHALLENGES

In mid-April, Bradley Van Hoose filed suit against the Village of Caseyville, Illinois, after a prolonged battle to access public records.¹ Seeking attorney's fees as well as civil penalties, Van Hoose is accusing the Village of refusing to disclose hotel meeting minutes and records related to the Village's hotel fund, some of which may be electronic.²

Loyola Public Interest Law Reporter

At the heart of the confrontation is Van Hoose's claim that the Village willfully and intentionally failed to comply with the Illinois Freedom of Information Act (FOIA) requests he filed more than six months earlier.³ If the case proceeds, the main issue both parties must address will be whether the Village's particular documents are considered private under current Illinois privacy laws, rendering them immune even from discovery in litigation.⁴

Caseyville is only one example highlighting the growing concern of allowing courts to define privacy.⁵ The security of private information, whether electronic or not, is of national importance.⁶ With new expansion of electronic discovery, or e-discovery, courts have started to refine their guidelines delineating just which electronically stored information (ESI) can be discoverable.⁷

To narrow the scope of what ESI might be privileged, judges focus on the end result by evaluating the burdens extensive discovery may place on a party if a set of documents is not granted protection.⁸

Privacy and discovery have had a tumultuous legal relationship, one that has grown even more contentious throughout the past decade.⁹ In December of 2005, the Federal Rules of Civil Procedure were amended to include discovery of ESI.¹⁰ With revisions to Rules 16, 26, 33, 34, 37 and 45, the amending of the rules was a watershed moment that marked the importance of digital data discovery.¹¹ This expansion, however, created unease that the inclusion of ESI would lead to a broadening of how courts define privacy, ultimately creating a hardship for the disclosing party.¹²

Anticipating this concern, the Illinois Supreme Court created a heightened standard for parties seeking disclosure, requiring that they demonstrate the necessity of any ESI discovery requested.¹³ There must also be a clear showing that the requested discovery does not place an undue burden on the disclosing party.¹⁴ Despite this standard, and owing to the increasing use and reliance on ESI, courts have struggled to identify what constitutes an undue burden in discovery.¹⁵

FOIA'S SHIFTING COSTS

According to Illinois public interest groups, such as the Citizen Advocacy Center, the crux of the problem facing the courts is how to find a balance

between privacy and discovery interests that does not disadvantage the public.¹⁶ Nowhere is this more apparent than in Van Hoose's case, where an individual or a group files suit against state agencies or municipalities.¹⁷

As part of the democratic tradition of the United States, private citizens like Van Hoose can use FOIA to request access to government documents.¹⁸ The problem arises when the individual files suit against an agency to compel disclosure of records. In such scenarios, the court must take into account a state's privacy laws, precedent case law on ESI and applicability of FOIA exemptions – three elements that typically lean heavily in the government's favor.¹⁹

Illinois, for its part, has worked to safeguard the privacy of its own departments at a significant cost to the public.²⁰ As a result of new amendments to FOIA, the public now must bear a greater burden to access information the State deems private.²¹ Under FOIA, records in possession of public agencies may be accessed by the public upon written request.²² While this provision ensures public access, it also limits the disclosure to certain types of information and records.²³

In 2011, however, Governor Pat Quinn signed into law SB-2203, which created significant changes to FOIA.²⁴ SB-2203 elevates the financial considerations of agencies in the calculus of considering FOIA requests.²⁵ Additionally, the amendment extends the deadline by which a public body must act on a records request.²⁶

With the new changes, Illinois has been criticized for shifting the burden to the public in regards to record request and disclosure.²⁷ Attorney General Lisa Madigan's office, for one, views the SB-2203 amendments as a "step backward for open government."²⁸

IMPLICATIONS FOR ILLINOISANS

Fortunately for Van Hoose, he has found an ally in Attorney General Madigan.²⁹ In February, she ordered Caseyville to turn over the requested documents, dismissing the Village's attempt to use a FOIA exemption and label Van Hoose a "recurrent requester."³⁰

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Still, others like Van Hoose are in need of protections that place them on equal footing with the government during a FOIA dispute. Whether pursuing disclosure of an agency's ESI through e-discovery or FOIA, the problem remains in determining what documents or records may be privileged and merit protection.³¹

There is a pressing need for the State to appropriately define privacy in both the e-discovery and FOIA context. Illinois's SB-2203 is criticized for discouraging public participation because it returns substantial burdens back to the public.³² These increased burdens mark the State's failure to better protect the public's rights.

Van Hoose's circumstances demonstrate that citizens wishing to dispute FOIA denials have no other recourse but litigation – a move that may well prove fruitless if courts do not begin to challenge the State's definition of privacy regarding records.

NOTES

1 Ann Maher, *FOIA requester sues Caseyville seeking fees, costs and civil penalties*, MADISON RECORD (Apr. 19, 2012), available at <http://www.madisonrecord.com/news/243435-foia-requester-sues-caseyville-seeking-fees-costs-and-civil-penalites>.

2 *Id.*

3 *Id.*; see also Sammy Caiola, *Evanston city clerk staff will expand to handle increased FOIA requests*, DAILY NORTHWESTERN (Apr. 18, 2012), available at <http://www.dailynorthwestern.com/city/evanston-city-clerk-staff-will-expand-to-handle-increased-foia-requests-1.2731082> (noting that it takes between 10 to 15 minutes to process and deliver a FOIA request).

4 See generally Chad Howell, *Qualified Discovery: How Ashcroft v. Iqbal Endangers Discovery when Civil rights Plaintiffs File Suit Against Government Officials*, 21 GEO. MASON U. CIV. RTS. L.J. 299 (2011) (arguing that the doctrine of qualified immunity from discovery for government agencies and actors is in need of review by the Supreme Court).

5 See Lior Strahilevitz, *Can the police keep up with Jones?*, CHI. TRIB., Jan. 27, 2012, available at http://articles.chicagotribune.com/2012-01-27/news/ct-perspec-0127-privacy-20120127_1-facial-recognition-gps-device-cameras (discussing the recent Supreme Court ruling in *U.S. v. Jones* which sought to better define the balance of privacy interests).

6 Leahy Marks 25th Anniversary OF ECPA, *Announces Plan to Mark Up Reform Bill*, U.S. SENATE, Oct. 20, 2011, available at http://www.leahy.senate.gov/press/press_releases/release/?id=56c35200-efdc-497a-9eaf-a75b498515b8.

7 See Patricia Groot, *Electronically Stored Information: Balancing Free Discovery With Limits on Abuse*, 2 DUKE L. & TECH. REV. 12 (2009) (examining the steps courts have taken to protect ESI related discovery abuse).

8 *Id.*; see also Damian Vargas, *Electronic Discovery: 2006 Amendments to the Federal Rules of Civil Procedure*, 34 RUTGERS COMPUTER & TECH. L. J. 399 (2008) (addressing the relationship between ESI accessibility and burdens placed on the disclosing party).

9 See Jeff Kosseff, *The Elusive Value: Protecting Privacy During Class Action Discovery*, 97 GEO. L.J. 289 (2008) (discussing the California Supreme Court's ruling in *Pioneer Electronics (USA), Inc. v. Superior Court* and the privacy related compromises the Court considered).

10 FIOS, *FRCP - Federal Rules of Civil Procedure governing Electronic Discovery*, <http://www.fiosinc.com/case-law-rules/e-discovery-federal-rules-civil-procedure-frcp.aspx> (last visited Apr. 23, 2012).

11 *Id.*

12 Vargas, *supra* note 8, at 405.

13 See generally *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386 (discussing Ill. S.Ct. R. 224 (eff. May 30, 2008)).

14 Vargas, *supra* note 8, at 398.

15 See John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. TIMES, Mar. 4, 2011, available at <http://www.nytimes.com/2011/03/05/science/05legal.html?page-wanted=all> (showing that in the past, it was not uncommon for a large trial to require examination of millions of documents at high costs - a problem solved by more efficient modern software).

16 Citizen Advocacy Center, *Freedom of Information and Open Meetings Midwest Project Summary*, Apr. 19, 2009 available at <http://www.ilga.gov/joint/Documents/Citizen%20Advocacy%20Center's%20Midwest%20Project%20on%20the%20Freedom%20of%20Information%20and%20Open%20Meetings%20Act.pdf>.

17 *National Ass'n of Criminal Defense Lawyers v. Chi. Police Dep't*, 399 Ill.App.3d 1, 17 (2011).

18 *Id.*

19 See generally Justin Cox, *Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. CITY L. REV. 405 (2010) (evaluating different issues courts consider in FOIA litigation).

20 Jake Griffin, *FOIA Changes Create 'Nuisance' Class, Critics Say*, DAILY HERALD, Aug. 31, 2011, available at <http://www.dailyherald.com/article/20110830/news/708309733/>.

21 *Id.*

22 5 ILCS 140.

23 *FOIA - Freedom of Information*, ILL. DEP'T OF THE INTERIOR, available at <http://www.dnr.illinois.gov/FOIA/Pages/default.aspx> (last visited Apr. 23, 2012).

24 Griffin, *supra* note 20.

25 *Id.*

26 Illinois General Assembly, S.B. 2203 status, available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2203&GAID=11&DocTypeID=SB&SessionID=84&GA=97> (last visited Apr. 20, 2012).

27 Griffin, *supra* note 20.

28 Andrew Thomason, *Public records law could see restrictions*, ILL. STATEHOUSE NEWS, Apr. 12, 2011, available at <http://illinois.statehousenewsonline.com/5709/public-records-law-could-see-restrictions-2/>.

29 Maher, *supra* note 1.

30 *Id.*

31 *National Ass'n of Criminal Defense Lawyers*, 399 Ill.App.3d at 17.

32 See *FOIA*, *supra* note 23 (citing burdens such as raising the standard that citizens must meet in order to receive information from government agencies).