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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# High Court FOI Case Could Open State Records To Nonresidents

By **Allison Grande**

*Law360, New York (October 09, 2012, 9:54 PM ET)* -- The U.S. Supreme Court on Friday agreed to consider a constitutional challenge to a Virginia freedom of information law that limits public records access to residents and news organizations located within the state, a case that, in resolving a circuit split, could force seven other states to drop their similarly restrictive laws, experts say.

By granting certiorari, the high court will take up the Fourth Circuit's February determination that the residents-only provision of the Virginia Freedom of Information Act was constitutional because access to public records is not a right protected by the privileges and immunities clause and because the law does not discriminate against interstate commerce or out-of-state economic interests in violation of the dormant commerce clause.

This ruling directly conflicts with the Third Circuit's 2006 decision in Lee v. Minner, which struck down the Delaware Freedom of Information Act's identical residents-only provision as unconstitutional on the grounds that the law facially discriminates against nonresidents' exercise of the opportunity to access public records, a right that the Third Circuit found was protected by the privileges and immunities clause.

"[T]he Fourth Circuit's decision, if allowed to stand, will impose senseless additional costs on those who request public records, invite selective enforcement, and encourage every state to impose intolerable new burdens on the national market for public information," petitioners Mark J. McBurney and Robert W. Hurlbert contended in their brief.

Currently, seven other states — Tennessee, Georgia, Arkansas, Alabama, Missouri, New Hampshire and New Jersey — have open record statutes that prohibit nonresident access, but experts expect this balance to dramatically shift depending on which circuit the Supreme Court decides to back.

"If the Supreme Court says that the Virginia law is unconstitutional, the other laws will effectively fall away as well as states either change their laws or decide not to enforce them," Mayer Brown LLP Supreme Court and appellate practice member Richard Katskee told Law360 Tuesday. "But if the court finds the law to be constitutional, my prediction is that lots of other states will adopt more restrictive public records laws because responding to open records request take up a lot of time, and states might like the idea of being able to limit these requests."

Mark Caramanica — the freedom of information director at Reporters Committee for Freedom of the Press, which filed an amicus brief in the Fourth Circuit and anticipates lodging one in the high court over the impact that this law has on journalists attempting to obtain records — echoed these sentiments.

“The Supreme Court is deciding whether a discriminatory policy within a state FOIA law is constitutionally permissible,” he said. “If they say that it is, there's nothing that prevents states from enacting these types of laws, and the negative impact would be simply compounded.”

The petitioners initiated the instant action after the state denied Rhode Island citizen McBurney's request for information about the handling of a child support petitions and California resident Hurlbert's bid for property records that he wanted to obtain for clients of his information services business.

After reversing the lower court's determination that the plaintiffs lacked standing to bring the suit, the Fourth Circuit upheld the dismissal of the case, distinguishing the instant action by noting that the prior Third Circuit case had recognized a right to access only records of “national, political and economic importance” and not the records of “personal import” at issue in the matter brought by McBurney and Hurlbert.

In urging the high court to take up the case, the petitioners cited not only this circuit split, but also the court's failure to address this area of constitutional law since its 1978 decision in Baldwin v. Fish & Game Commission of Montana, which held that obtaining an elk-hunting license was not the type of fundamental right covered by the privileges and immunities clause of the Constitution.

A ruling would also help resolve ongoing challenges to residents-only restrictions in other state FOIA laws, according to the brief.

The petitioners specifically cited a case challenging the Arkansas law in which the Eighth Circuit acknowledged the circuit split but dismissed in June due to the challengers' failure to preserve the suit in district court; Georgia providing nonresident access as a policy matter but reserving a statutory right to withhold that access; and a pending appeal before the Sixth Circuit contesting the dismissal of a suit challenging Tennessee's law on the same grounds as the instant action.

“A decision [by the Sixth Circuit] can only deepen the split, not resolve it,” the brief said.

In its own brief, the state downplayed this issue, saying that there was “no deep or mature split” and that no prior court decisions had recognized the right for nonresidents to obtain documents for “personal import.”

“Were the court to break new ground, and move the long-established landmarks, it would throw into confusion the states' long-established authority to confer certain 'special privileges' upon their citizens, and not others,” the ruling said.

While this desire to protect residents' information from broad surveillance was likely a major factor behind the creation of these disputed laws, this effort has also resulted in residents being unable to perform proper oversight of their local governments, according to Katskee.

“This case is about the right of the public to know what the government is up to,” he said. “In an era where we spend lots of time talking about transparency of the government, it's peculiar to let states say that their citizens can have access to the information but no one else.”

The previous expansion of records access in Delaware was particularly important because many businesses are incorporated in the state, Katskee noted.

Lifting this restrictions could have a similar effect in Virginia, Caramanica added, pointing out that the state is home to many defense contractors and could hold records related to the workings of the federal government in nearby Washington.

The Supreme Court's ruling is poised to impact not only citizens' access to government records, but also that of media organizations, experts noted.

“Reporters are no longer just concerned about their local communities,” Katskee said. “Local news becomes national news and has national significance.”

While the Virginia law allows “representatives of newspapers and magazines with circulation in the commonwealth, and representatives of radio and television stations broadcasting in or into the commonwealth” to obtain information, this provision “certainly doesn't reflect the current state of media where many organizations have websites that are accessible within the state,” and could restrict access to information necessary to compile nationwide surveys on topics such as the federal health care mandate, according to Caramanica.

While difficult to predict how the justices will rule, Katskee noted that both the more business-focused commerce clause argument and the privileges and immunities clause, which would have more of an impact on residents' rights, were strong, and that the high court was likely “to view the arguments of the petitioners as quite persuasive.”

“The Fourth Circuit viewed this case through a lens of localism that no longer exists today,” Katskee said. “Our interests are much broader today and the economy is much more interwoven nationally, so the Fourth Circuit's view seems like a peculiar way to look at things.”

The petitioners are represented by Deepak Gupta and David Arkush of Gupta PLLC and Leah M. Nichols and Brian Wolfman of Georgetown University Law Center.

The case is McBurney et al. v. Young, case number 12-17, in the U.S. Supreme Court.

--Editing by Sarah Golin and Richard McVay.