



OFFICE of GOVERNMENT INFORMATION SERVICES

March 1, 2016—Sent via email

[REDACTED]
[REDACTED]

Re: Case No.: 201501140
NG: HK: CM

NATIONAL
ARCHIVES
and RECORDS
ADMINISTRATION

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Dear [REDACTED]:

This responds to your August 28, 2015 request for assistance from the Office of Government Information Services (OGIS), which we received via email. We apologize for our delay in responding to your request for assistance.

Congress created OGIS to complement existing Freedom of Information Act (FOIA) practice and procedure; we strive to work in conjunction with the existing request and appeal process. The goal is for OGIS to allow, whenever practical, the requester to exhaust his or her remedies within the agency, including the appeal process. OGIS has no investigatory or enforcement power, nor can we compel an agency to release documents. OGIS serves as the Federal FOIA Ombudsman and our jurisdiction is limited to assisting with the FOIA process.

In your case, you made a request to the Small Business Administration (SBA) for records about [REDACTED] from SBA's Office of Inspector General (OIG). OIG withheld portions of some responsive records and additional pages in full pursuant to FOIA Exemptions 5, 6, 7(C), 7(D), and 7(E). You appealed that response, and SBA's FOIA appeals office upheld OIG's initial response to your request. You dispute this response and ask for OGIS's assistance with this matter.

In response to your request, OGIS staff contacted SBA Assistant Counsel to the Inspector General [REDACTED] to discuss your request and the agency's response. [REDACTED] confirmed that SBA's response to your request was proper and the agency is firm in its position. [REDACTED] explained the withheld material included statements from SBA employees and identifying information about those individuals. He further explained that the statements were provided with the assurance of confidentiality; for this reason, the agency is firm in its decision to withhold the records you seek. In situations like this in which an agency is firm in its position, there is little for OGIS to do beyond providing more information regarding the agency's response.

As you may be aware, FOIA provides for disclosure of many agency records. At the same time Congress included in the FOIA nine exemptions from disclosure that provide protection for important interests such as personal privacy, privileged communication, and certain law enforcement activities.

FOIA Exemption 5, 5 U.S.C. § 552(b)(5), protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than



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an agency in litigation with the agency.” Courts have interpreted Exemption 5 to incorporate three privileges: the attorney work-product privilege, the attorney-client privilege and the deliberative process privilege. SBA cited the deliberative process privilege in its use of Exemption 5 to withhold the records you seek.

The deliberative process privilege covers documents that are predecisional and a direct part of the deliberative process (for instance, those that make recommendations or express opinions on legal or policy matters). Courts have suggested three policy reasons for this privilege and exemption: (1) to encourage open, frank discussion on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not ultimately the grounds for an agency's action.

The rationale behind the deliberative process privilege is that public disclosure of information of this type would prevent "the full and frank exchange of ideas" from "flowing freely." *Mead Data Cent. v. Dep't of Air Force*, 184 U.S. App. D.C. 350, 566 F.2d 242, 256 (D.C. Cir. 1977). The privilege serves to assure agency employees that they can provide a decision maker with their opinions without fear of public scrutiny. This prevents premature disclosure of proposed policies and to protect against public confusion through the disclosure of document advocating or discussing reasons for policy decisions that were ultimately not adopted. In your case, SBA OIG invoked this exemption for internal communications between federal agents assessing an investigation as it was being conducted; these communications were part of the OIG's deliberative process.

FOIA Exemptions 6 and 7(C) protect personal privacy interests. FOIA Exemption 6, 5 U.S.C. § 552(b)(6), protects information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), is limited to information compiled for law enforcement purposes and protects personal information when disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

When making release determinations pursuant to Exemptions 6 and 7(C), an agency must weigh the public interest against an individual's right to privacy. Courts have consistently held that the central purpose of FOIA is to allow people to learn about the conduct of agencies, not to discover information about other individuals. The Supreme Court held that "the statutory purpose [of FOIA] is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989).

Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), broadly protects all information shared with criminal law enforcement agencies by confidential sources in criminal investigations. Exemption 7(D) is designed to protect confidential sources from retaliation that could result if information pertaining to their law enforcement activities were disclosed. Agencies use Exemption 7(D) to withhold information which could reasonably be expected to disclose the identity of a confidential source who provides information to investigators in a criminal matter.

FOIA Exemption 7(E), 5 U.S.C. § 552(b)(7)(E), applies to information compiled for law enforcement purposes and authorizes an agency to withhold information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

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I hope that this information about your request is useful to you. Thank you for contacting OGIS; we will now consider this matter closed.

Sincerely,

/s/

JAMES V.M.L. HOLZER
Director

cc: SBA FOIA