



OFFICE *of* GOVERNMENT INFORMATION SERVICES

April 4, 2016 — Sent via email

[REDACTED]
[REDACTED]

Re: Case No.: 201600551
NG: CM: KG

NATIONAL
ARCHIVES
and RECORDS
ADMINISTRATION

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Dear Ms. Alsterberg:

This responds to your request for assistance from the Office of Government Information Services (OGIS), which we received on February 24, 2016 via email. Your request for assistance pertains to a records request to the Department of Veterans Affairs (VA).

Congress created OGIS to complement existing 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.

OGIS carefully reviewed your submission. On [REDACTED] you requested records from the VA related to [REDACTED]. On [REDACTED] the VA identified 8 pages responsive to your request. The agency released 4 pages in full, but withheld the other 4 pages in full pursuant to FOIA Exemption 3, 5 U.S.C. § 552(b)(3). You appealed this decision, and on [REDACTED] the VA responded to your appeal. The VA affirmed the initial determination to withhold information under FOIA Exemption 3; the appellate authority also cited FOIA Exemption 5 and 6, 5 U.S.C. § 552(b)(5) and (b)(6). You ask for OGIS's assistance with this matter, explaining the importance of the records you seek.

In response to your submission, OGIS contacted VA to discuss your request and the agency's response. VA affirmed its decision to withhold the records you seek. VA informed OGIS that it was firm in its decision. In cases such as this where an agency is firm in its position, there is little for OGIS to do beyond providing more information about the exemptions the agency invoked.

FOIA Exemption 3 incorporates other, separate statutes that require information to be withheld from release. In this case, VA relies on 38 U.S.C. § 5705 as the withholding statute. That law, Confidentiality of Medical Quality Assurance Records, prohibits the disclosure of records and documents created by VA as part of a medical quality assurance program.



In order to use Exemption 3 to withhold information, an agency must first establish that a particular statute is a non-disclosure statute and that the particular criteria for withholding information are in the actual words of the statute, not in the legislative history of the withholding statute.

Exemption 3 to FOIA establishes two categories of statutes—those that provide agencies with no discretion for withholding information and those that provide agencies with some discretion by establishing particular criteria or referring to particular types of matters. See 5 U.S.C. §§ 552(b)(3)(A) and (B). In other words, the discretion to release information potentially covered by Exemption 3 is not governed by FOIA, but by the withholding statute itself. In your case, the VA staff explained that these records fall under part (A) of the statute which does not give the staff any discretion to release the records to you.

On appeal, VA also cited to FOIA Exemption 5 in conjunction with Exemption 3. This exemption protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than 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. In its appeal response, VA cited the deliberative process privilege to withhold these records.

The deliberative process privilege covers documents that are predecisional and a direct part of the deliberative process (i.e., those that make recommendations or express opinions on legal or policy matters). The courts have suggested three policy reasons for this privilege and exemption: (1) to encourage open, frank discussions 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 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 uninhibited opinion without fear of public scrutiny, to prevent 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, VA invoked this exemption for the internal thoughts and opinions or recommendations that employees reflected in the document.

VA's appeal office also cited to FOIA Exemption 6 for some information that fell under the protection of this exemption within this document. Exemption 6 protects information from release that would be a “clearly unwarranted invasion of personal privacy.” Courts have found that individuals have a privacy interest in their name, address, date of birth, place of birth, employment history, and other personal information, and the privacy interest in protecting this information outweighs the public interest in its release. In our discussions with VA, the agency

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explained that Exemption 6 was used to withhold the names of individuals responsible for documenting the Patient Event Report (PER) and those individuals identified in the PER, including medical personnel who cared for your father.

I hope that this information about your request is useful to you. At this time, there is no further action that OGIS can take on your request for assistance. Thank you for contacting OGIS.

Sincerely,

JAMES V.M.L. HOLZER
DIRECTOR

We appreciate your feedback. Please visit <https://www.surveymonkey.com/s/OGIS> to take a brief anonymous survey on the service you received from OGIS.