



OFFICE *of* GOVERNMENT INFORMATION SERVICES

June 13, 2016—Sent via email

██████████
████████████████████

Re: Case No.: 201600601
NG: HK: CM

NATIONAL
ARCHIVES
and RECORDS
ADMINISTRATION

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Dear ██████████:

This responds to your request for assistance from the Office of Government Information Services (OGIS), which we received on January 7, 2016 via email. Your request for assistance pertains to your Freedom of Information Act (FOIA) request to the U.S. Patent and Trade Office (USPTO). I apologize for our delay in responding to your request.

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 provides mediation services to resolve disputes between FOIA requesters and Federal agencies. After opening a case, OGIS gathers information from the requester and the agency to learn more about the nature of the dispute. This process helps us gather necessary background information, assess whether the issues are appropriate for mediation, and determine the willingness of the parties to engage in our services. As part of our information gathering, OGIS carefully reviewed your submission of information.

In your case, you made a request to the USPTO for records created by the ██████████ including agendas, minutes, and emails. USPTO responded to your request by releasing 49 pages in part. It withheld another 39 pages in full; in withholding this material, USPTO cited FOIA Exemption 5, 5 U.S.C. § 552(b)(5). You appealed USPTO's response, citing your role as ██████████ and your interest in the records. USPTO denied your appeal. You seek OGIS's assistance with this matter.

In response to your submission, OGIS staff contacted USPTO staff to discuss your request and appeal. USPTO FOIA staff affirmed the agency's decision on your request. 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 agency's actions.

FOIA Exemption 5 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



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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. As USPTO explained in its December 11, 2015 letter denying your appeal, the agency cited the deliberative process privilege in withholding the records you seek.

The deliberative process privilege is the most commonly used privilege in the FOIA context. Courts have ruled that the privilege protects the “decision making processes of government agencies,” which includes documents as well as the deliberative process itself. While matters of agency policy have traditionally fallen under Exemption 5, it is more broadly interpreted by courts to include the entire deliberative process, whether or not a specific agency policy decision was at issue.

For the deliberative process privilege to apply, the communication must be predecisional and deliberative. Documents recommending a course of action are traditionally predecisional and a communication is deliberative if it reflects the agency’s decision-making process. That is not to say, however, that factual information contained within a deliberative document must always be released. When the facts themselves reflect the agency’s deliberative process, courts have held that they may be considered deliberative.

Attorney General Eric Holder, in a March 19, 2009 memorandum, strongly encouraged agencies to make discretionary disclosures of information where possible, <http://www.justice.gov/ag/foia-memo-march2009.pdf>. An attorney with USPTO informed us that the agency considered the foreseeable harm in releasing the records you requested, and ultimately determined that the information is exempt from release.

In your appeal, you explain your particular interest in the records you requested because you are [REDACTED]. Under FOIA, a release of information by an agency to any person is considered a release to the public. Thus, USPTO could not release any non-public information only to you.

I hope you find this information useful in understanding why USPTO withheld the material it did in response to your request. At this time, there is no further assistance OGIS can offer. Thank you for bringing this matter to OGIS. We will close your case.

Sincerely,

/s/

NIKKI GRAMIAN
Acting Director

cc: USPTO FOIA

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.