



OFFICE *of* GOVERNMENT INFORMATION SERVICES

June 23, 2016—Sent via email

████████████████████
████████████████████

Re: Case No.: 201600670
NG: HK: CM

NATIONAL
ARCHIVES
and RECORDS
ADMINISTRATION

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Dear ██████████:

This responds to your March 21, 2016 request for assistance from the Office of Government Information Services (OGIS), which we received via email. Your request for assistance pertains to your Freedom of Information Act (FOIA) request to the Office of Special Counsel (OSC).

As you may know, 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.

You made a request to OSC for a specific draft report which was completed in ██████. In response, OSC withheld 13 responsive pages pursuant to FOIA Exemptions 5 and 7(C), 5 U.S.C. § 552(b)(5) and (b)(7)(C). You appealed this response, arguing the applicability of the cited exemptions. OSC responded to your appeal, affirming the agency's initial action on your request. You seek OGIS's assistance with this matter.

In response to your submission, OGIS contacted Dawn Kral, OSC's FOIA Public Liaison, to discuss your request and the agency's response. Ms. Kral affirmed the agency's position on the record you seek. 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, 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 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 your case, OSC cited both the attorney work-product and deliberative process privileges in its use of Exemption 5.

Regarding OSC’s use of the attorney work-product privilege, this privilege protects documents prepared by an attorney (or a non-attorney supervised by an attorney acting as the agent of the attorney) in contemplation of litigation. Courts have held that the privilege attaches when there is at least “some articulable claim likely to lead to litigation”; in the case of OSC, at the Merit Systems Protection Board.

OSC also cited the deliberative process privilege, which 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. OGIS staff inquired whether OSC plans to make the responsive document final, and Ms. Kral informed us that since the document was prepared in anticipation of litigation, there is no plan to finalize it.

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>. Ms. Kral 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.

Regarding the agency’s use of Exemption 7(C), this exemption states that records compiled for law enforcement purposes may be withheld if they “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” Agencies must first meet the threshold requirement of FOIA Exemption 7 before withholding the information under Exemption 7(C). That threshold requires that the record was compiled for law enforcement purposes, which courts have interpreted to apply to civil and administrative enforcement actions in addition to criminal actions. The government recognizes a strong privacy interest in law enforcement records and courts have agreed that it is generally appropriate to withhold information that identifies third parties in law enforcement records. We note that OSC is considered to be a law enforcement agency.

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While I understand that this is not the outcome for which you hoped, I hope you find this information useful in understanding why OSC withheld the material it did in response to your request. Thank you for contacting OGIS; we will now consider this matter closed.

Sincerely,

/s/

NIKKI GRAMIAN

Acting Director

cc: OSC 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.