



OFFICE *of* GOVERNMENT INFORMATION SERVICES

January 27, 2014— Sent via email

NATIONAL  
ARCHIVES  
*and* RECORDS  
ADMINISTRATION

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[REDACTED]

Re: Case No.: 201400015  
MN: NG: KM

Dear [REDACTED]:

This further responds to your October 5, 2013 request for assistance from the Office of Government Information Services (OGIS), which we received on October 17, 2013 via email. I apologize for the delay in receiving your request, which arrived near the beginning of the 16-day Government shutdown. Your request for assistance pertains to your October 15, 2012 Freedom of Information Act (FOIA) request, No. [REDACTED], to the Federal Bureau of Investigation (FBI) seeking access to documents pertaining to Mossad.

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 its jurisdiction is limited to assisting with the FOIA process.

OGIS Facilitator Kirsten Mitchell carefully reviewed the correspondence pertaining to your request and discussed it with Dennis J. Argall, assistant chief of the FBI's Record/Information Dissemination Section and the agency's FOIA Public Liaison, and Matthew Hurd, an attorney advisor with the Office of Information Policy (OIP) at the Department of Justice.

I note that OIP, in response to Appeal No. [REDACTED], upheld the FBI's neither confirming nor denying the existence of records pertaining to Mossad.

As you know, when an agency responds to a FOIA request by neither confirming nor denying the existence of responsive records, this is known as the "Glomar" response. A "Glomar" response is proper when to admit that records even exist would reveal a fact that is exempt under FOIA. In your case, the existence or nonexistence of responsive records is exempt under FOIA Exemptions 7(A) and 7(E).

As you may also know, Exemption 7 is a multi-part law enforcement exemption. In order to apply any of the Exemption 7 sub-parts to a record, that record must meet the threshold requirement that it was compiled for law enforcement purposes. Any records the FBI might have on a foreign intelligence agency such as Mossad would have been created for law enforcement purposes.

We learned that the FBI carefully reviewed your FOIA request and interpreted it broadly as a request for any records pertaining to an ongoing investigation into Mossad. In this case, the fact that there *is* or *is not* an FBI investigation into Mossad is itself information that is exempt from disclosure under FOIA. If the FBI informed you that it has records pertaining to Mossad that must be withheld under Exemption 7(A), you would know that there is a pending investigation because Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), protects from disclosure law enforcement records pertaining to a pending or prospective law enforcement investigation when release of information could “reasonably be expected to interfere” with that investigation, meaning it would cause some articulable harm. In this case, the mere fact that there is or it not an investigation could cause an individual or individuals to change behavior, which could interfere with an investigation. As such, the FBI used Exemption 7(A) to neither confirm nor deny the existence of records pertaining to Mossad.

The FBI also cited Exemption 7(E), 5 U.S.C. § 552(b)(7)(E), in neither confirming nor denying the existence of records pertaining to Mossad. Exemption 7(E) authorizes an agency to withhold information compiled for law enforcement purposes 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.” In your case, confirmation that a foreign intelligence organization is the target of an FBI investigation may reveal information that could assist the organization in circumventing the law by determining which of its members are likely to be questioned or detained. Courts, including the U.S. Court of Appeal for the District of Columbia Circuit, have ruled that agencies are not required to demonstrate harm or a balancing of interests under Exemption 7(E). *See Keys v. DHS*, 510 F. Supp. 2d 121, 129 (D.D.C. 2007).

Please know that one way to show that a Glomar response is not proper is to provide evidence that an official of the agency has publicly and officially acknowledged a fact that would establish a basis for concluding that records about a subject exist (or existed). A report by news organization, a reference in unrelated documents released under FOIA or acknowledgment by a former FBI official does not equate to confirmation of information or a fact by a government official.

With regard to your noting that some of the records you seek are more than 25 years old, please know that the decades that have passed since the FBI—or any other agency—created documents does not act as a waiver for release of the information under FOIA.

Finally, we carefully reviewed the June 2, 1993 letter to U.S. Senator Dan Coats from FBI Legislative Counsel Charles E. Mandigo which you received in response to another FOIA request and which you submitted to OGIS noting that it references Mossad. The mention of Mossad in that letter appears to be in reference to newspaper articles and is not an acknowledgment by the FBI that it was or is investigating Mossad. Please know that

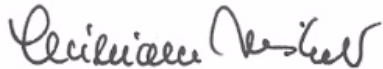
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information reported in the media may not be releasable under FOIA, and does not automatically act as a waiver of an agency's ability to withhold the information under FOIA.

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. I hope that this information about your request is useful to you. At this time, there is no further assistance OGIS can offer and we will close your case. Thank you for bringing this matter to OGIS

Sincerely,



Miriam Nisbet, Director  
Office of Government Information Services (OGIS)

cc: Dennis J. Argall, FBI FOIA Public Liaison, via email  
Matthew Hurd, attorney advisor, OIP, via email

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.