



OFFICE of GOVERNMENT INFORMATION SERVICES

January 12, 2015 — Sent via email

Mr. Kel McClanahan
Executive Director
National Security Counselors
1200 S. Courthouse Road
Arlington, VA 22204
[REDACTED]

Re: Case No.: 201500205

NATIONAL
ARCHIVES
and RECORDS
ADMINISTRATION

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20740-6001

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phone: 202-741-5770
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Dear Mr. McClanahan:

This responds to your December 10, 2014 request for assistance from the Office of Government Information Services (OGIS), which we received via email. Your request for assistance pertains to a request made by your client, [REDACTED], for records from National Security Agency (NSA) related to “the discontinuation of [his] hiring process.”

As you are aware, 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.

As you may know when an individual requests access to his or her own records, as [REDACTED] has done, it is most often considered a Privacy Act, or first-party, request. Privacy Act matters falls outside the scope of our office’s mission as the FOIA Ombudsman. However, many Privacy Act requests overlap with FOIA; therefore, OGIS provides ombuds services, including providing information about the process of requests, to individuals requesting their own records. OGIS does not have a statutory role in reviewing policies, procedures and compliance with the Privacy Act as we do with FOIA.



I have carefully reviewed your submissions of information relating to [REDACTED] request, and I understand that the NSA provided an interim response to him that withheld the “polygraph recordings/charts” in their entirety pursuant to FOIA Exemption (b)(2), (b)(3), and b(7)(E); 5 U.S.C. §§ 552(b)(2), (b)(3), and (b)(7)(E). The agency also offered your client appeal rights in this interim response; however, it is your understanding that the agency has either communicated or inferred that if your client does not appeal the interim response, he will not be allowed to appeal the agency’s decision on the interim release when the agency sends its final response. You dispute this action, as well as the agency’s use of “High (b)(2)” and you note that Exemption “High (b)(2)” was ruled invalid by the Supreme Court (*Milner v. Dep’t of the Navy*, 131 S. Ct. 1259 (2011)).

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In order to learn more about the agency's actions on this request, I contacted the NSA's Chief FOIA/PA Officer, Mr. Paul Blaskowski. In my discussions with Mr. Blaskowski I asked for an explanation of agency's use of Exemption 2 and learned that the agency did not invoke "High (b)(2)" to withhold the information that [REDACTED] seeks. Rather, Mr. Blaskowski explained the agency is only invoking Exemption 2, previously known as "Low (b)(2)". In order to clarify this issue, Mr. Blaskowski asked OGIS to provide the following information to supplement its October 6, 2014 letter to [REDACTED]:

The polygraph recordings/charts have been withheld in their entirety pursuant to subsection (b)(2) of the FOIA, which exempts from disclosure matters related solely to the internal personnel rules and practices of an agency. This exemption has been held to apply to matters concerning "conditions of employment in federal agencies-such matters as hiring and firing, work rules and discipline, compensation and benefits." Milner v. Department of the Navy, 562 U.S. 562 (2011). In addition, Exemption 7 of the FOIA protects from disclosure records or information compiled for law enforcement purposes. This includes information that, if released, would reveal law enforcement techniques or procedures. We have determined that such information exists in these records, and it has been withheld under (b)(7)(E). Please be advised that the polygraph sessions are not transcribed.

In response to your concerns regarding appeal rights offered at the interim response and the communications you've had with the FOIA unit that suggest to you that appeals of the interim decision will not be considered timely at the time of the agency's final response to this request, Mr. Blaskowski explained that the NSA offered [REDACTED] appeal rights with this interim response as a customer-friendly gesture so that he did not have to wait until the case was completed to first begin the appeal process. Mr. Blaskowski confirmed that [REDACTED] can appeal the withholding of the polygraph records when the final response is issued by the agency.

I hope you find this information useful. 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,



Nikki Gramian, Acting Director
Office of Government Information Services (OGIS)

cc: NSA FOIA Public Liaison

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.