



OFFICE of GOVERNMENT INFORMATION SERVICES

February 11, 2015 — Sent via U.S. mail

[REDACTED]
[REDACTED]
[REDACTED]

Re: Case No.: 201500368
NG: CM: KG

NATIONAL
ARCHIVES
and RECORDS
ADMINISTRATION

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Dear [REDACTED]

This responds to your February 2, 2015 request for assistance from the Office of Government Information Services (OGIS), which we received on February 2, 2015 via fax. Your request for assistance pertains to your Freedom of Information Act (FOIA) request to the U.S. Department of Health and Human Services (HHS), Office of Civil Rights.

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 staff carefully reviewed the correspondence you submitted with your request for assistance. I understand that you made a FOIA request to the HHS, for a copy of the file on the Office of Civil Rights (OCR) Transaction Number [REDACTED] on April 30, 2010. OCR located 209 pages of responsive records. OCR referred 19 of those records to the Center for Medicare and Medicaid Services (CMS) for review. Once those records were returned to OCR, they released 208 of those pages to you on July 21, 2010. OCR withheld portions of these records under exemption b(5) and one page entirely under b(5). You appealed OCR's decision on August 23, 2010. HHS reviewed your case and your appeal which contested the adequacy of the search and the withholding of information under b(5). HHS upheld the search, stating that, "search was conducted by and within the program area (OCR) which customarily maintains these types of case files." HHS partially overturned the disclosure determination, but continued to withhold portions of seven pages of responsive records, pursuant to B(5).



OGIS reached out to HHS to get more information on your case. The agency was responsive to OGIS's inquiry. An HHS representative explained that the agency made every effort to release as much information as possible. They withheld only portions of the records which contained certain inter-agency

communications that warranted protection under the deliberative process privilege, and the attorney-client privilege of exemption b(5).

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 common legal privileges: the attorney work-product privilege, the attorney-client privilege and the deliberative process privilege. HHS cited the attorney-client and deliberative process privileges in its use of Exemption 5.

HHS claimed the attorney-client privilege. The Supreme Court addressed the important public policy that the attorney-client privilege serves and applied it in the FOIA context, stating that “sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The attorney-client privilege is not limited to the litigation context. *Rein v. U.S. Patent and Trademark Office*, 553 F.3d 353, 375 (noting that the privilege “extends beyond communications in contemplation of particular litigation to communications regarding ‘an opinion on the law’”).

The deliberative process privilege is the most commonly used privilege in the FOIA context. Courts have ruled that it protects the “decision making processes of government agencies,” which includes documents as well as the deliberative process itself. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). 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. *AFGE v. U.S. Dep’t of Commerce*, 907 F.2d 203, 208 (D.C. Cir. 1990) (protecting promotion recommendations made to the official who had authority to accept or reject them); *Ashley v. U.S. Dep’t of Labor*, 589 F.Supp. 901, 908-09 (D.D.C. 1983) (holding that documents containing internal agency evaluations can be protected so long as they were part of a deliberative process).

For the deliberative process privilege to apply, the communication must be predecisional as well as deliberative. Documents recommending a course of action are traditionally predecisional. *Nadler v. DOJ*, 955 F.2d 1479, 1491 (11th Cir. 1992) (“[A] recommendation to a supervisor on how to proceed is predecisional by nature.”). 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. *Brannum v. Dominguez*, 377 F. Supp. 2d 75, 83 (holding that Air Force “vote sheets” used in the process of determining retirement benefits were “precisely the type of predecisional documents intended to fall under Exemption 5” even though they were factual in nature).

The HHS representative suggested if you are looking for Medicaid and/or Medicare claim records, you should contact your state Medicare office in North Carolina, and/or the Medicare Administrative Contractor (MAC) for North Carolina. The MAC is Palmetto Government

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Benefits Administrators; their web site is at:

<http://www.palmettogba.com/palmetto/palmetto.nsf/DocsCat/Home> . If you are receiving Medicare Benefits, Palmetto would be handling your Medicare claims if you are enrolled in traditional Medicare. If you are enrolled in a Medicare Advantage Plan, then you should contact that plan.

I hope you find this information useful in understanding why the HHS withheld the material it did in response to your request. We've included copies of your initial request and appeal, since you mentioned you didn't have them readily accessible. 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)

Enclosures

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.