



OFFICE *of* GOVERNMENT INFORMATION SERVICES

May 26, 2015 — Sent via email

[REDACTED]

Re: Case No.: 201500551
NG: CM

NATIONAL
ARCHIVES
and RECORDS
ADMINISTRATION

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OGIS
COLLEGE PARK, MD
20740-6001

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e-mail: ogis@nara.gov
phone: 202-741-5770
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Dear [REDACTED]

This responds to your March 30, 2015 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 Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for records related to an explosion at [REDACTED].

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.

In your case, you requested records related to an explosion in which your firm's client [REDACTED]. The ATF responded to your request, informing you that the records you seek are exempt from release pursuant to FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A). You appealed that response, explaining in your appeal letter that the criminal proceeding related to the explosion is complete, and that your client needs the withheld records to proceed with [REDACTED] civil claim. The Department of Justice Office of Information Policy (OIP) affirmed the ATF's action on your request. You dispute this response.

As you are likely aware, FOIA is a federal law that allows individuals to request any existing record at any Federal agency for any reason. However, not all records that can be requested under FOIA may be disclosed. Congress included in FOIA nine exemptions that agencies may invoke when there is a need to protect important interests such as personal privacy, law enforcement activities and others. In your case, the ATF determined that at the time of your request, the records you seek needed to be withheld pursuant to Exemption 7(A).

Exemption 7(A) protects law enforcement records pertaining to a pending or prospective law enforcement investigation or proceeding when release of information could "reasonably be expected to interfere" with that investigation or enforcement proceeding, meaning it would cause some articulable harm. Courts have recognized



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specific harm that disclosure of records can cause a law enforcement proceeding, including the premature release of witness statements and potential documentary evidence.

Exemption 7(A) is temporal in nature and not intended to “endlessly protect material simply because it is in an investigatory file,” according to the Department of Justice Guide to the Freedom of Information Act. (http://www.justice.gov/oip/foia_guide09/exemption7a.pdf) Courts have ruled that Exemption 7(A) remains applicable throughout long-term law enforcement investigations or proceedings. Further, even after an enforcement proceeding is closed, courts have ruled that the continued use of Exemption 7(A) may be proper in certain instances. One such instance involves "related" proceedings, i.e., those instances in which information from a closed law enforcement proceeding will be used again in other pending or prospective law enforcement proceedings.

It may be helpful to know that as part of the appeals process on cases such as yours, OIP confirms that Exemption 7(A) is still applicable to the records sought at the time of the appeal. If you wish to inquire whether 7(A) still applies to the records you seek, you may file another FOIA request for those records at any time. Please be aware that once the agency is able to process your request, other FOIA exemptions may apply to those records.

In your correspondence to OGIS, you explain that your client seeks these records to assist ██████ in ██████ civil proceeding. For your information, FOIA and discovery provide entirely different processes for obtaining information from the Federal government. FOIA provides a general right of public access to records, while discovery offers a tool used during litigation to obtain information, usually from an opposing party. While FOIA may be used in conjunction with discovery, Federal courts have “well established that a FOIA requester cannot rely upon his status as a private party litigant – in either civil or criminal litigation – to claim an entitlement to a greater FOIA access than would be available to the average requester.” (Department of Justice FOIA Update, Vol. VI, No. 3, 1985, http://www.justice.gov/oip/foia_updates/Vol_VI_3/page5.htm)

In cases such as this, 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. Thank you for contacting OGIS; we will now consider this matter closed.

Sincerely,

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

cc: Amanda Hoffmaster, ATF FOIA