



OFFICE of GOVERNMENT INFORMATION SERVICES

December 14, 2015- Sent via U.S. mail

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Re: Case No. 201600079  
NG: HK: CM: AB

NATIONAL  
ARCHIVES  
and RECORDS  
ADMINISTRATION

8601 ADELPHI ROAD  
COLLEGE PARK, MD  
20740-6001

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Dear [REDACTED]

This responds to your request for assistance to the Office of Government Information Services (OGIS), which we received on October 20, 2015. In your submission, you request mediation services regarding records that the Executive Office for United States Attorneys (EOUSA) withheld from you in response to your Freedom of Information Act (FOIA) request.

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.

We carefully reviewed the materials you submitted, and we understand that you made a request to the Department of Justice Civil Division for records concerning [REDACTED]. In its response, the Civil Division informed you that it found seven pages in its files that were under the purview of EOUSA. The Civil Division referred the pages to EOUSA to process and respond to you directly. EOUSA withheld all seven pages in their entirety, citing Privacy Act exemptions and FOIA Exemptions 5, 6 and 7(C), 5 U.S.C. § 552(b)(5), (b)(6) and (b)(7)(C).

We contacted EOUSA to learn more about the seven pages it withheld. EOUSA's FOIA unit explained that the withheld material comprises one three page memo and one four page memo authored by an Assistant U.S. Attorney (AUSA) and sent to an official in the Tort Branch at the Civil Division. The memos are legal analysis of claims [REDACTED] in the course of litigation.

The main exemption EOUSA relied upon to withhold these documents is FOIA Exemption 5, 5 U.S.C. § 552(b)(5). This exemption 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



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Exemption 5 to incorporate three privileges: the attorney work-product privilege, the attorney-client privilege and the deliberative process privilege.

According to EOUSA, Exemption 5 applies to the withheld memos pursuant to the attorney-work product privilege. The attorney-work product privilege (AWP) protects material prepared by an attorney or others in anticipation of litigation, preserving the adversarial trial process by protecting material which would disclose the attorney's theory of the case or trial strategy. The AWP also protects materials that reflect the mental processes of the attorney, when the materials were prepared in anticipation of litigation or for trial. An agency can satisfy the "anticipation of litigation" standard by "demonstrating that one of its lawyers prepared a document in the course of an investigation that was undertaken with litigation in mind," even if *no* specific lawsuit has begun. *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, at 1202 (D.C. Cir. 1991). The information in these memos were authored by an Assistant U.S. Attorney which contained his opinion, theory of the case, facts, assessments of facts, and impression of the issues presented. For these reasons, EOUSA withheld the two memos (7 pages) under Exemption 5.

EOUSA also cited FOIA Exemptions 6 and 7(C) to protect the name and direct phone number of the AUSA who authored these two memos. FOIA Exemption 6 protects information about individuals, such as names, addresses, and phone numbers of third parties, in "personnel and medical files and *similar files*" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." FOIA Exemption 7(C), is limited to information compiled for law enforcement purposes and protects personal information when disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

When making release determinations pursuant to Exemptions 6 and 7(C), an agency must weigh the public interest against an individual's right to privacy. Courts have consistently held that the central purpose of FOIA is to allow people to learn about the conduct of agencies, not to discover information about other individuals. The Supreme Court held that "the statutory purpose [of FOIA] is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). The standard of public interest in records of this type is limited to information that reveals the operations and activities of the government. The *Department of Justice Guide to the Freedom of Information Act* provides an explanation of "public interest" under the Supreme Court case referenced above that states, "under the Reporter's Committee, the standard of public interest to consider is one specifically limited to the FOIA's 'core purpose' of 'shedding light on an agency's performance of its statutory duties.'" Accordingly, information that does not reveal the operations and activities of government does not satisfy the public interest requirements. Hence, individuals who are involved in law-enforcement positions, such as employees of the Department of Justice, have privacy interests in the non-disclosure of their identities. That privacy interest belongs to the individual, not to the agency. See *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989). Further, the D.C. Circuit has held that "unless access to the names and addresses of private individuals appearing in files within the ambit of Exception 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from

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disclosure." *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991). It may be helpful to know that EOUSA would protect your identify much the same way if it were it to receive a request for your records from anyone other than you.

I hope you find this information useful. 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,

JAMES V.M.L. HOLZER  
Director

cc: Donna Preston, EOUSA