



OFFICE of GOVERNMENT INFORMATION SERVICES

April 25, 2016 — Sent via U.S. mail

NATIONAL
ARCHIVES
and RECORDS
ADMINISTRATION

8601 ADELPHI ROAD
OGIS
COLLEGE PARK, MD
20740-6001

web: www.ogis.archives.gov
e-mail: ogis@nara.gov
phone: 202-741-5770
toll-free: 1-877-684-6448
fax: 202-741-5769

Re: Case No. 201600541
NG: CM: KG



Dear [REDACTED]:

This responds to your request for assistance from the Office of Government Information Services (OGIS), which we received on February 19, 2016 via U.S. mail. Your request for assistance pertains to your records request to the Federal Bureau of Prisons (BOP).

OGIS was created 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. Please know that 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.

After opening a case, OGIS gathers information from the requester and the agency to learn more about the nature of the dispute. This process helps us gather necessary background information, assess whether the issues are appropriate for mediation, and determine the willingness of the parties to engage in our services.

OGIS staff carefully reviewed the correspondence you submitted with your request for assistance. You submitted a FOIA request to BOP, which the agency acknowledged on [REDACTED]. On [REDACTED] you appealed, stating the agency failed to comply with the provisions of the FOIA by exceeding the statutory time limit for a response. Subsequent to your appeal, BOP responded to your request by releasing [REDACTED] pages in their entirety, [REDACTED] pages in part, and withheld [REDACTED] pages in their entirety. In withholding these records, BOP cited FOIA Exemptions 5, 6, and 7(C), 5 U.S.C. §552(b)(5), (b)(6) and (b)(7)(C). You appealed this response, and on [REDACTED] [REDACTED] the Department of Justice's Office of Information Policy (OIP) affirmed BOP's action on your request, upholding BOP's use of these exemptions to withhold information related to attorney privileged communications and information concerning a third party. You requested OGIS's assistance with this matter.



April 25, 2016

Page 2 of 3

In response to your submission, OGIS contacted OIP to discuss the agency's response to your appeal. OIP affirmed its decision to withhold the records you seek. 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 exemptions the agency invoked.

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 privileges: the attorney work-product privilege, the attorney-client privilege and the deliberative process privilege. In your case, BOP claimed the attorney-client privilege to withhold the records you seek. When agency employees discuss confidential legal advice with their agency attorneys, that information can be withheld under the Attorney-Client (AC) privilege. Courts have held that federal agencies may enter into privileged AC relationship with their agency lawyers in order to function effectively. The Supreme Court has held that the scope of Exemption 5 is coextensive with the scope of each of the civil discovery privileges it incorporates; *see United States v. Weber Aircraft Corp.*, 104 S.Ct. 1488 (1984); *FTC v. Grolier Inc.*, 462 U.S. 19 (1983). The purpose of this privilege is to protect from civil discovery those "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977).

You also requested records related to [REDACTED] and [REDACTED]; in withholding these records, BOP cited FOIA Exemptions 6 and 7(C).

FOIA Exemptions 6 and 7(C) protect personal privacy interests. FOIA Exemption 6, 5 U.S.C. § 552(b)(6), protects information about individuals 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), 5 U.S.C. § 552(b)(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).

Courts have also specifically addressed privacy interests involved in criminal investigations of third parties and have overwhelmingly ruled that individuals' privacy interest outweigh the public interest in disclosure because of the stigma or harassment that may result from public knowledge of an investigation.

In order to protect the personal privacy of individuals, both the FOIA and the Privacy Act of 1974 prohibit the government from releasing information about a third party without his or her written consent, proof of his/her death or without a showing of an overriding public interest in disclosure of the information.

To demonstrate an overriding public interest in disclosure of information related to "official misconduct," you must produce "evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred." *NARA v. Favish*, 541 U.S. 157, 174 (2002). The standard of public interest in records of this type is limited to

April 25, 2016

Page 3 of 3

information that reveals the operations and activities of the government. The *Department of Justice Guide to the Freedom of Information Act* states that “‘bare suspicion’ of [official] misconduct is inadequate and that a requester must produce evidence that would be credible in the eyes of a reasonable person. When a requester asserts government misconduct as the public interest in disclosure, that requester must make a ‘meaningful evidentiary showing’ in order to provide a public interest ‘counterweight’ to the privacy interest” (pages 589-590).

I hope you find this information useful in understanding why the BOP responded to your request as it did. 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,

/s/

JAMES V.M.L. HOLZER
DIRECTOR

cc: Matthew Hurd, Senior Attorney, Department of Justice, Office of Information Policy
C. Darnell Stroble: FOIA Public Liaison, Bureau of Prisons