



OFFICE of GOVERNMENT INFORMATION SERVICES

May 25, 2016—Sent via email

[REDACTED]
[REDACTED]

Re: Case No.: 201600397
NG: HK: CM

NATIONAL
ARCHIVES
and RECORDS
ADMINISTRATION

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Dear [REDACTED]

This responds to your request for assistance from the Office of Government Information Services (OGIS), which we received on January 11, 2016 via U.S. mail. Your request for assistance pertains to your Freedom of Information Act (FOIA) request to the Equal Employment Opportunity Commission (EEOC).

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.

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. As part of our information gathering, OGIS carefully reviewed your submission of information. We understand that you made two requests to EEOC—[REDACTED]. You dispute EEOC's responses to your requests, and ask for OGIS's assistance with this matter.

Request No. [REDACTED]

In response to this request, EEOC released portions of the records related to charge No. [REDACTED]; EEOC's [REDACTED] response letter informed you that other responsive documents were withheld pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5). You appealed this response, and on appeal, EEOC released an additional record to you, with portions withheld pursuant to Exemption 5. You dispute the agency's decision to withhold certain records, and dispute the adequacy of the agency's search.



OGIS staff contacted EEOC FOIA Public Liaison Stephanie Garner to discuss your request and the agency's response. Ms. Garner affirmed EEOC's decision to withhold portions of the records you seek from charge [REDACTED] pursuant to FOIA Exemption 5. 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 agency's actions.

Regarding EEOC's use of FOIA Exemption 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 Exemption 5 to incorporate three privileges: the attorney work-product privilege, the attorney-client privilege and the deliberative process privilege. In your case, EEOC cited Exemption 5's deliberative process privilege.

Courts have ruled that the deliberative process privilege, which is the most commonly-cited of Exemption 5's privileges, protects the "decision making processes of government agencies"; this includes documents, as well as the deliberative process itself. 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.

For the deliberative process privilege to apply, the communication must be predecisional and deliberative. Documents recommending a course of action are traditionally predecisional and 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.

Regarding your concern about documents that you believe are missing from EEOC's release, Ms. Garner confirmed that an adequate search for your investigative charge file records was conducted on appeal. Federal courts have long settled that in regard to a search for documents, the crucial issue is whether an agency conducted an adequate search for a document, not whether a document *might* exist. An adequate search is conducted when the search is reasonably calculated to uncover all relevant documents. *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)

Request No. [REDACTED]

This request relates to charge No. [REDACTED]. EEOC denied your request in full pursuant to FOIA Exemptions 3 and 7(C), 5 U.S.C. § 552(b)(3)(A)(i) and (b)(7)(C). You appealed that response, and EEOC denied your appeal. You dispute this response and assert that you should have access to these records.

Regarding EEOC's use of Exemption 3, this exemption allows for the withholding of information prohibited from disclosure by another federal statute provided that the statute requires that the matters be withheld from the public in such a manner as to leave no discretion

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on the issue, or establishes particular criteria for withholding or refers to particular types of matters to be withheld.

In this case, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) specifically provides that it shall be unlawful for any officer or employee of the Commission to make public, in any manner, information obtained by the Commission pursuant to its authority under this section, prior to the institution of any proceeding under this subchapter involving such information. Therefore, Title VII of the Civil Rights Act of 1964 is an Exemption 3 statute as it specifically requires that such matters be withheld from the public. Ms. Garner explained that when you withdrew your charges of [REDACTED], your relationship changed vis à vis the Title VII aspects of those charges to that of a member of the public; for this reason, EEOC is prohibited from disclosing charge information to you.

EEOC also cited FOIA Exemption 7(C), which states that records compiled for law enforcement purposes may be withheld if they “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” The government recognizes a strong privacy interest in law enforcement records and courts have agreed that it is generally appropriate to withhold information that identifies third parties in law enforcement records.

I hope you find this information useful in understanding why EEOC withheld the material it did in response to your request. 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/

NIKKI GRAMIAN

Acting Director

cc: EEOC FOIA

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.