



OFFICE of GOVERNMENT INFORMATION SERVICES

August 3, 2016 — Sent via email

[REDACTED]

Re: Case No. 201600139
NG: HK: CM: CL

Dear [REDACTED]:

This responds to your October 31, 2015, request for assistance from the Office of Government Information Services (OGIS) concerning your Freedom of Information Act (FOIA) request to the Department of Justice Civil Rights Division (CRT). We apologize for our delay in responding to your request for assistance.

Congress created OGIS to complement existing FOIA practice and procedure; we strive to work in conjunction with the existing request and appeal process. Our goal is 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.

On [REDACTED], you submitted a FOIA request (No. 1 [REDACTED]) to CRT for records concerning the [REDACTED]. On [REDACTED], CRT responded to your request releasing six pages to you in part with portions withheld under FOIA Exemption 7(C), and denying 94 pages in their entirety under FOIA Exemptions 5 and 7(C), 5 U.S.C. § 552(b)(5) and (b)(7)(C). CRT's response stated that the Division located records that originated with the Federal Bureau of Investigation (FBI) which it referred to the Bureau for review and a direct response to you. On appeal (No. [REDACTED]), the Department of Justice Office of Information Policy (OIP) remanded the six pages withheld in part to CRT for further processing. OIP otherwise affirmed CRT's action on your request on partly modified grounds, stating that the CRT properly withheld certain information under FOIA Exemption 3, 5 U.S.C. § 552(b)(3), as well as the exemptions cited in the initial response letter. CRT processed the six remanded pages and released them to you. You requested OGIS assistance in obtaining access to additional records concerning the subject of your request.

We carefully reviewed your submission and contacted CRT's FOIA Office to inquire about the Division's action on your request. CRT affirmed its action on your

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



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request. In situations where an agency is firm in its position, OGIS can do little beyond providing information about the agency's action on a request and the rationale behind it.

As you may be aware, Congress included within FOIA nine categories or "exemptions" under which agencies may withhold information to protect government and personal privacy interests. CRT invoked Exemptions 3, 5, and 7(C) to withhold material responsive to your request.

FOIA Exemption 3 authorizes the withholding of agency records on subjects exempted from disclosure by statute, provided that such statute, "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to the types of material to be withheld." In your case, the relevant (b)(3) statute is Rule 6(e) of the Federal Rules of Criminal Procedure, which establishes a presumption of nondisclosure of grand jury materials (testimony, subpoenas, exhibits and names of grand jury witnesses) and protects them from disclosure. Individuals who disclose grand jury materials may be charged with contempt and face up to six months imprisonment. In addition, a prosecutor who leaks grand jury material may be charged with a felony under Title 18, punishable by up to five years in prison and a \$250,000 fine.

FOIA Exemption 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. As explained in CRT's [REDACTED] response to your request, the Division invoked Exemption 5 to protect predecisional deliberative material and attorney work product including interagency memoranda and attorneys' notes from disclosure.

The attorney work-product privilege protects documents prepared by an attorney in contemplation of litigation. Courts have held that the privilege attaches when there is at least "some articulable claim likely to lead to litigation."

The deliberative process privilege is the most commonly used privilege in the FOIA context. Courts have ruled that the privilege protects the "decision making processes of government agencies," which includes documents as well as the deliberative process itself. While matters of agency policy have traditionally fallen under Exemption 5, courts have more broadly interpreted it 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. Typically, agencies review and release factual information contained within a deliberative document. However, when the facts themselves reflect the agency's deliberative process, courts have held that they may be considered deliberative. CRT informed us that the withheld information included notes and work papers expressing recommendations and opinions on legal or policy matters prior to a decision being made. The agency maintains that granting a discretionary release in response to your request would potentially chill the agency's deliberative process.

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Courts have held that agencies can properly protect records if their release might harm the ability to freely communicate regarding agency decisions.

Under Exemption 7(C), agencies may withhold records compiled for law enforcement purposes if disclosure “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. The mere mention of an individual in connection with a law enforcement investigation could invade that individual’s personal privacy if the information became public.

Agencies frequently invoke Exemption 7(C) to withhold references to individuals who are not targets of an investigation, but are merely mentioned in law enforcement files, as well as to individuals in whom a law enforcement agency has an investigatory interest. Courts have upheld withholding names of third parties, witnesses, agency employees, including law enforcement officers, under this exemption. In your case, CRT invoked Exemption 7(C) to withhold the names and other identifying information of third parties named in the responsive records.

I hope you find this information useful. Thank you for bringing this matter to OGIS; at this time there is no further action for us to take and we consider your case closed.

Sincerely,

/s/

NIKKI GRAMIAN
Acting Director

cc: CRT FOIA Unit, via email