



OFFICE of GOVERNMENT INFORMATION SERVICES

August 5, 2016 - Sent via email

NATIONAL  
ARCHIVES  
and RECORDS  
ADMINISTRATION

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Re: Case No. 201600864  
NG: CM: KG

Dear [REDACTED]:

This responds to your May 18, 2016 request to the Office of Government Information Services (OGIS), which we received via U.S. mail. Your request for assistance concerns your Freedom of Information Act (FOIA) request to United States Citizenship and Immigration Services (USCIS).

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.

OGIS provides mediation services to resolve disputes between FOIA requesters and Federal agencies. 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 regarding your two record requests.

You made a request to USCIS on [REDACTED] for all records related to your client, [REDACTED]. On [REDACTED], USCIS responded to your request, providing 542 pages. Of these pages, USCIS released 454 in their entirety and 51 in part, the agency withheld another 22 pages in full pursuant to FOIA Exemptions 5, 6, 7(C), and 7(E), 5 U.S.C. 522 §§ (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). On [REDACTED], you appealed this determination. On [REDACTED], USCIS responded to your appeal, releasing an additional 14 pages partially withheld pursuant to Exemptions 5 and 6. For the remaining withheld pages, the agency affirmed its initial determination. You requested OGIS's assistance with this matter specifically addressing records that were withheld under FOIA Exemption 5 and 7(E).

OGIS contacted USCIS to discuss your request and address your questions about the agency's actions. Regarding your inquiry about the material under Exemption 5, USCIS FOIA staff explained that the agency used Exemption 5's deliberative process privilege to protect the asylum officer's assessment. USCIS affirmed its position on this matter and explained that USCIS released its asylum officer's notes in accordance with the Martin case, however, the



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officer's assessment referral to an immigration judge was a document that USCIS withheld under 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.

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.

USCIS cited the deliberative process privilege in its use of Exemption 5. 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, 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. USCIS explained to OGIS staff that a series of recent decisions, including a very recent Court of Appeals decision in D.C. Circuit have all held the withholding of the asylum officer's assessment under FOIA Exemption 5 were found to be proper.

As it relates to your dispute concerning USCIS' withholding of information under FOIA Exemption 7(E), USCIS explained that all database query results were withheld under FOIA Exemption 7(E). Exemption 7(E) authorizes an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

"The D.C. Circuit has held that an agency may withhold information from disclosure where releasing such information would provide insight into its investigatory or procedural techniques." *Techserve All. v. Napolitano*, 803 F. Supp. 2d 16, 28-29 (D.D.C. 2011); *see also Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (noting that Exemption 7(E) offers "a relatively low bar for the agency to justify withholding" information). Exemption 7(E) allows for withholding "not just for circumvention of the law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk." *Mayer Brown LLP v. Internal Revenue Serv.*, 562 F.3d 1190, 1193 (D.C. Cir. 2009). USCIS explained that the specific information it withheld dealt with the database results, which if disclosed, could reveal techniques used by law enforcement investigators when sharing information across the agencies. There is reasonable risk that disclosure of this information would weaken the USCIS effectiveness and potentially aid in circumvention of the techniques. Accordingly, USCIS explained this information was property withheld under Exemption 7(E) of the FOIA. *See, Skinner v. DOJ*, 893 F. Supp. 2d 109, 114 (D.D.C. 2012) ("The Court concludes that the USCIS's decision to redact the TECS access codes is appropriate under Exemption 7(E)."), *aff'd sub nom., Skinner v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 12-5319, 2013 WL 3367431 (D.C. Cir. May 31, 2013).

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OGIS also asked why the agency did not cite a FOIA Exemption with regard to the withholding on page 421 of the released documents. USCIS informed OGIS that specific page was referred to Immigration and Customs Enforcement (ICE) for processing. ICE will process it and respond directly to you.

With regard to your assertion that [REDACTED] B1/B2 visa should have been in her A-file. USCIS confirmed that the B1/B2 visa form was part of the A-file, however in accordance with agency regulations, USCIS referred those documents to the Department of State for direct processing and response to you.

You also requested an index of the documents that USCIS withholds, citing the case *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). The *Vaughn* ruling does not require agencies to prepare an itemized index of withheld documents in every case as that decision was in the context of litigation, not the administrative process. Requesters whose FOIA request is pending in the administrative stage of processing, generally are not entitled to a *Vaughn* index. See e.g., *Bangoura v. U.S. Dep't of the Army*, 607 F.Supp.2d 134(D.D.C. 2009).

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,

/s/

NIKKI GRAMIAN  
Acting Director

cc: Mark Porter, United States Citizenship and Immigration Services

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.