



OFFICE of GOVERNMENT INFORMATION SERVICES

July 30, 2013 - Sent via e-mail



Re: Case No. 201300484
MN: NG: CZ

NATIONAL
ARCHIVES
and RECORDS
ADMINISTRATION

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Dear 

This is in further response to your April 25, 2013 request for assistance from the Office of Government Information Services (OGIS). You wrote to us requesting assistance with a Freedom of Information Act (FOIA) dispute with the Social Security Administration (SSA).

As you may know, Congress created OGIS under the OPEN Government Act of 2007 to resolve FOIA disputes with the goal of avoiding litigation. Since opening our doors in September 2009, OGIS has received more than 1,200 cases and has successfully resolved most of them by facilitating discussions between FOIA requesters and Federal agencies. We offer mediation services as a non-binding alternative to litigation. Participation in OGIS's mediation services is voluntary. We cannot order an agency to release records.

In your case, you requested information related to an agency investigation of you. SSA provided you with some records, but withheld information under FOIA Exemptions 5, 6 and 7(C), (D) and (E), 5 U.S.C. §§ 552(b)(5), (6) and (7)(C), (D) and (E), as well as the Privacy Act of 1974, 5 U.S.C. § 552a. You filed an appeal of that decision which included some statements and questions to the agency. As SSA responded to you, FOIA provides the public with a right to request agency records but not to obtain answers to questions. On appeal, SSA provided you with additional information in part citing to some of the same FOIA exemptions.

You disputed the agency's withholding of information, as you shared with OGIS, particularly because this was an investigation about you and because agency investigators directed you to use FOIA to request information about the investigation.

As you discussed with OGIS Attorney Advisor Corinna Zarek, FOIA provides the public with a right to request agency records, however, not all agency records are considered public under FOIA law. There are specific exceptions to release, set forth in the FOIA exemptions, that protect privacy interests, law enforcement investigations and other information that Congress and the courts have deemed to be non-public.

In your case, Ms. Zarek discussed the types of information that were withheld from release with Mona Finch, the FOIA Public Liaison for SSA. I understand she also discussed that with you, as well as why the FOIA exemptions listed appeared to properly apply to the information at issue.



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 common legal privileges: the attorney work-product privilege, the attorney-client privilege and the deliberative process privilege. SSA 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 it protects the “decision making processes of government agencies,” which includes documents as well as the deliberative process itself. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). 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. *See Ashley v. U.S. Dep’t of Labor*, 589 F.Supp. 901, 908-09 (D.D.C. 1983) (holding that documents containing internal agency evaluations can be protected so long as they were part of a deliberative process). In your case, SSA withheld emails discussing the investigation citing to Exemption 5.

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.” In your case, these exemptions were used to withhold names of third-party individuals including other agency employees.

In considering withholding records under Exemptions 6 and 7(C), an agency must weigh the interest in public disclosure 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 U.S. 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). Information about private or non-high profile individuals is generally withheld under these exemptions.

Exemption 7(D) broadly protects all information shared with criminal law enforcement agencies by confidential sources in criminal investigations. *See Reiter v. DEA*, No. 96-0378, 1997 WL 470108 (D.D.C. Aug. 13, 1997). In your case, the name and identifying information of the individual who initiated the agency complaint was withheld under Exemption 7(D) as a confidential source.

FOIA Exemption 7(E), 5 U.S.C. § 552(b)(7)(E), applies to information compiled for law enforcement purposes and authorizes an agency to withhold information that “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.” In your case, SSA withheld the checklist forms that

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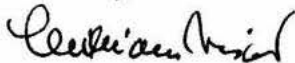
the agency used to investigate the matter because they show the agency's investigative process and could potentially lead to circumvention of that process.

Finally, when you spoke again with Ms. Zarek you specifically inquired about an incident report. Ms. Zarek learned that the agency's initial search did not return an incident report; no incident report was withheld from you in this request. SSA suggested that you may wish to file a new request specifically for an incident report so that the agency can search for that document to learn whether such a report has been maintained in your case.

Ms. Finch said the agency carefully considered your request both initially and on appeal. She said SSA is confident it properly provided you with the maximum amount of information allowed under FOIA law. As you discussed with Ms. Zarek, there are other, non-FOIA avenues you may wish to pursue if you continue to seek more of this information. You may wish to consult with your union representative or an attorney to discuss those avenues.

In a case such as this where an agency is firm in its position, there is little else that OGIS can do by way of assistance beyond providing more information about the agency's actions. I hope this information has been helpful to your understanding of why SSA withheld the information you were seeking. At this time, there is no further assistance we can offer you in this case. Thank you for bringing this matter to OGIS; we will consider your case closed.

Sincerely,



Miriam Nisbet, Director
Office of Government Information Services

cc: Mona Finch, FOIA Public Liaison, Social Security Administration

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.