



OFFICE of GOVERNMENT INFORMATION SERVICES

November 10, 2015 — Sent via email

[REDACTED]

Re: Case No. 201500878  
NG: CM: AS

NATIONAL  
ARCHIVES  
and RECORDS  
ADMINISTRATION

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OGIS

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20740-6001

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Dear [REDACTED]:

This responds to your office's July 24, 2015, request for assistance from the Office of Government Information Services (OGIS), pertaining to your Freedom of Information Act (FOIA) request to the Commodity Futures Trading Commission (CFTC). Thank you for contacting OGIS.

Congress created OGIS as the Federal FOIA Ombudsman to complement existing FOIA practice and procedure; we strive to work in conjunction with the agency's 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.

In your submission to OGIS, you requested assistance with your FOIA request (No. [REDACTED]) and subsequent appeal to CFTC. You inquired about CFTC's application of FOIA Exemption 4 and requested consideration of the Stipulated Protective Order and/or a detailed log of the withheld documents.

We carefully reviewed your submission of information. CFTC initially identified 1,060 pages of records responsive to your request. Of those documents, CFTC released 288 pages to you on [REDACTED]. CFTC applied FOIA Exemption 4 to withhold the remaining 772 pages in full. You appealed this response, but CFTC's appeals staff upheld the agency's initial decision on your request.

We contacted CFTC to discuss your dispute. CFTC staff reviewed the request and affirmed the agency's final position on the records you seek. In cases such as this where an agency is firm in its response, there is little assistance OGIS can offer beyond providing more information about the agency's actions.

In your correspondence, you dispute the agency's use of Exemption 4, 5 U.S.C. § 552(b)(4). This exemption protects "trade secrets or commercial or financial information obtained from a person [that is] privileged or confidential." Exemption 4 provides protection to submitters who furnish commercial or financial information to the government by insulating them from competitive disadvantages that may result from disclosure. To qualify for Exemption 4 protection, the information must be a trade secret or commercial



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or financial information, and it must be obtained from a person (this includes corporations) and contain privileged or confidential information. In your case, CFTC determined that the records you seek fall into this category. Regarding your request to receive an index of the withheld pages, such a document is typically referred to as a Vaughn index (from 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. In our role as an ombudsman, OGIS asked the CFTC to provide us with more information about the exempt information and the types of records withheld.

The CFTC FOIA specialist explained that the records requested were [REDACTED]. Entities and individuals must submit these forms to the CFTC, through the National Futures Association, in order to conduct business regulated by the CFTC. Under 17 C.F.R. § 1.10(g)(1), the forms are exempt from disclosure pursuant to FOIA, except for certain portions as set out in 17 C.F.R. § 1.10(g)(2), (5). The withheld pages are those pages that are exempt from disclosure under the regulation and contain confidential commercial or financial information.

Regarding your request for the provision of the exempted records due to the Stipulated Protective Order, CFTC remains firm in its position that FOIA is not subject to protective orders, because under FOIA release to one is a release to all.

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

Sincerely,

JAMES V.M.L. HOLZER  
Director

cc: CFTC Office of General Counsel, via email

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.