



OFFICE of GOVERNMENT INFORMATION SERVICES

May 10, 2016 — Sent via email

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Re: Case No.: 201600632  
NG: CM: KG

NATIONAL  
ARCHIVES  
and RECORDS  
ADMINISTRATION

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OGIS  
COLLEGE PARK, MD  
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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 March 11, 2016 via mail. Your request for assistance pertains to your records request to the Central Intelligence Agency (CIA).

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.

As you may know, when an individual requests access to his or her own records, it is most often, but not always, considered a Privacy Act, or first-party, request. Federal agencies will process requests under both FOIA and the Privacy Act of 1974 in order to provide requesters with the fullest degree of access available.

Privacy Act matters fall outside the scope of our office's mission as the FOIA Ombudsman. However, many Privacy Act requests overlap with FOIA; therefore, OGIS provides ombuds services, including providing information about the process and the status of requests, to individuals requesting their own records. OGIS does not have a statutory role in reviewing policies, procedures and compliance with the Privacy Act as we do with FOIA.

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 on [REDACTED] you requested records from the CIA related to [REDACTED]



[REDACTED]. The CIA responded to your request on [REDACTED], informing you that it withheld the responsive materials in full pursuant to FOIA Exemptions 1, 3, and 5, 5 U.S.C. § 552 (b)(1),(b)(3) and (b)(5). You appealed this determination on [REDACTED]. The CIA's Agency Release Panel (ARP) issued its final response to your appeal on [REDACTED], affirming the initial determination to withhold information. You requested OGIS's assistance with this matter.

In response to your submission, OGIS contacted the CIA to discuss your request and the agency's response. The CIA confirmed that the agency is firm in its position. 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.

Under Exemption 1, 5 U.S.C. § 552(b)(1), the FOIA does not require the production of records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." CIA relies upon Executive Order 13526 which governs the classification and protection of national security information, to withhold the exempt information. Information can be properly classified under E.O. 13526 if four requirements are met: (1) an original classification authority has classified the information; (2) the United States Government owns, produces, or controls the information; (3) the information pertains to one or more of eight protected categories listed in Section 1.4 of the Executive Order, which include intelligence methods; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in a specified level of damage to the national security, and the original classification authority is able to identify or describe the damage.

Exemption 3, 5 U.S.C. § 552(b)(3), permits agencies to withhold from disclosure records "specifically exempted from disclosure by statute . . . [provided that such statute either] (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (A)(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." In analyzing documents withheld pursuant to Exemption 3, "the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007).

The CIA first points to the Central Intelligence Act of 1949, as amended, 50 U.S.C. § 403-4 *et seq.* (CIA Act), which exempts the CIA from "any...law which require(s) the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 403g. In addition, the CIA proffers the National Security Act of 1947, as amended, 50 U.S. C. § 401 *et seq.* (the NSA), which mandates that the "Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S. C. § 403-1(i)(1). It is well established that both statutory provisions cited by the CIA qualify as withholding statutes for purposes of Exemption 3. *See, e.g., ACLU v. U.S. Dep't of Defense*, 628 F. 3d. 612, 619 (D.C. Cir. 2011).

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CIA also cited to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), to withhold the material you seek. 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, the CIA cited the attorney work-product (AWP) privilege to withhold these records. The AWP privilege protects material prepared by an attorney or others in anticipation of litigation, preserving the adversarial trial process by protecting material which would disclose the attorney's theory of the case or trial strategy. The AWP privilege also protects materials that reflect the mental processes of the attorney, when the materials were prepared in anticipation of litigation or for trial. An agency can satisfy the "anticipation of litigation" standard by "demonstrating that one of its lawyers prepared a document in the course of an investigation that was undertaken with litigation in mind," even if *no* specific lawsuit has begun. *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, at 1202 (D.C. Cir. 1991). The information withheld contains CIA attorneys' opinion, theory of the case, discussion of the facts, assessments of facts, and impression of the issues presented. For these reasons, the agency withheld the information within the withheld records under the AWP privilege of Exemption 5.

I hope that this information about your request is useful to you. At this time, there is no further action that OGIS can take on your request for assistance. Thank you for contacting OGIS.

Sincerely,

/s/

JAMES V.M.L. HOLZER

Director

cc: Central Intelligence Agency