

U.S. Department of
Homeland Security

United States
Coast Guard



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5720
May 17, 2017

Mr. Ryan P. Mulvey
Cause of Action
1919 Pennsylvania Avenue NW
Suite 650
Washington, D.C. 20006
RE: DHS FOIA APPEAL 2016-HQAP-00065

Dear Mr. Mulvey:

This letter is in further response to your Freedom of Information Act (FOIA) appeal regarding the Department of Homeland Security (DHS) Privacy Office's (Agency) May 06, 2016 letter concerning FOIA Request 2016-HQFO-00691. Specifically, you are appealing the adequacy of the Agency's search, application of FOIA Exemptions (b)(5) and (b)(6), and failure to reasonably segregate responsive material and to produce legible records.

Your initial request sought records from April 1, 2014 to present, including:

1. All records reflecting or referring to waivers from Department of Homeland Security ("DHS") Sensitive Systems Policy Directive 4300A that were granted to Secretary Jeh Johnson, Deputy Secretary Alejandro Mayorkas, or any other DHS official including but is not limited to, formal waivers, informal waivers, and any records concerning the approval or denial of a waiver request (e.g., correspondence with or amongst employees of the Office of the Chief Information Officer related to the processing of a waiver request);
2. All records containing guidelines, policies, or rules for official record retention that were issued or otherwise available to the waiver recipients identified in item one of this request; and,
3. All official records created by any waiver recipient identified in item one of this request on Internet Webmail or other personal e-mail account.

In response to your initial request, the Agency searched the DHS Management Directorate and Chief Information Officer for responsive records. This search yielded 691 pages, 24 of which the Agency released in full. Of the remaining 667 pages, 459 were partially redacted, and 208 were withheld in their entirety pursuant to FOIA Exemptions (b)(5) and (b)(6).

Pursuant to a memorandum of agreement, the United States Coast Guard Office of the Chief Administrative Law Judge is reviewing the FOIA appeals for the Department of Homeland Security General Counsel's office. Therefore, the Office of the Chief

Administrative Law Judge will be rendering the official appeal decision on behalf of the Department of Homeland Security.

On February 2, 2017, I issued an interim response letter remanding the Agency's determination for further explanation and clarification. As I stated in that interim letter, I could not determine whether the Agency properly applied the relevant FOIA Exemptions. Further, upon receiving clarifying information, I would issue a final determination letter. On or about February 24, 2017, the Agency provided me with additional information concerning this FOIA matter. As such, this is the aforementioned final determination letter.

After a thorough review of your appeal and all applicable documents including the Agency's additional information, I am upholding the Agency's determination in part and remanding it in part to release information to you.

First, the adequacy of an agency search is judged by a test of "reasonableness," which will vary from case to case. See 5 U.S.C. § 552(a)(3); Zemansky v. EPA, 767 F.2d 569 (9th Cir. 1985) (observing the reasonableness of an agency search depends upon the facts of each case). The Agency is in the best position to determine where to search for potentially responsive records. See Sakamoto v. EPA, 443 F. Supp. 2d 1182, 1198 (N.D. Cal. 2006) (finding the agency conducted an adequate search when it "reasonably concluded" that responsive records would "most likely" be within one region); see also Knight v. NASA, No. 04-254, 2006 WL 3780901, at *5 (E.D. Cal. 2006) (stating that "there is no requirement that an agency search all possible sources in response to a FOIA request when it believes all responsive documents are likely to be located in one place").

Courts have determined a search is reasonable when based on a reasonable interpretation of the scope of the request and records sought. See Anderson v. Dep't of Justice, 236 F. App'x 591 (2d Cir. 2009) (finding search reasonable where agency conducted two searches, both failing to identify responsive records, and described in detail how it conducted searches and operation of database used to do so); see also Jennings v. Dep't of Justice, 230 F. App'x 1 (D.C. Cir. 2007) (holding agency performed reasonable search and recognizing that an adequate search depends not on the search results but by the methods used to conduct the search). Here, the record demonstrates that the Agency performed an adequate search. The Agency conducted a search of the locations it determined were most likely to yield responsive records based upon the information you provided in your initial request. As such, I am upholding the Agency's action concerning its search.

Second, after a thorough analysis of the record, I am upholding the Agency's application of FOIA Exemption (b)(5). The record demonstrates that DHS used Exemption (b)(5) appropriately in that DHS withheld records, the disclosure of which could negatively impact the quality of agency decisions and have a chilling effect on candid, open conversations between and amongst DHS employees. As such, DHS' application of Exemption 5 was proper.

Finally, I am remanding the Agency's application of FOIA Exemption (b)(6) to the Agency to release previously redacted information to you. Exemption (b)(6) covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). An unwarranted invasion of personal privacy is determined by balancing the protection of privacy interests involved with any public interest in the requested information. Multi Ag Media LLC, v. USDA, 515 F.3d 1224, 1228 (D.C. Cir. 2008). Generally, privacy interests are found in personally identifying information such as a person's name,

address, phone number, date of birth, criminal history, medical history, and social security number. See Dep't of State v. Wash. Post Co., 456 U.S. 595, 600 (1982). However, information may also be withheld under Exemption (b)(6) if determined the information "could easily lead to the discovery of an individual's name and home address" Forest Guardians v. FEMA, 410 F.3d 1214, 1220-1 (10th Cir. 2005).

Here, I find that the Agency did not properly apply Exemption (b)(6) in certain instances. I am therefore remanding this portion for the Agency's review and release of information to you.

This decision is the final action of the Department of Homeland Security concerning your initial FOIA request 2016-HQFO-00691. While a comprehensive review of your appeal was mad, you may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B) in United States District Court for either: (1) the district where you reside; (2) the district where the agency records are situated; or, (3) the District of Columbia.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

Sincerely,

Timothy A. O'Connell

TIMOTHY A. O'CONNELL
Attorney Advisor
United States Coast Guard

Copy : FOIA Officer, DHS Privacy Office
Sent: Via first class mail to the above address.