



OFFICE of GOVERNMENT INFORMATION SERVICES

May 29, 2015 — Sent via email

[REDACTED]

Re: Case No.: 201400636
NG: CM: CL

Dear [REDACTED]:

This letter responds to your February 26, 2015 request for assistance from the Office of Government Information Services (OGIS), which we received via email. Your request for assistance pertains to your Freedom of Information Act (FOIA) request and subsequent appeal to the Defense Contract Management Agency (DCMA). I apologize for our delay in responding to your request.

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 or process one request before others. OGIS serves as the Federal FOIA Ombudsman and our jurisdiction is limited to assisting with the FOIA process.

On [REDACTED], you submitted a FOIA request, [REDACTED], to DCMA for records concerning [REDACTED]. DCMA responded to your request on [REDACTED], releasing records with portions withheld under FOIA Exemption 5, 5 U.S.C. § 552(b)(5). You disputed DCMA's action on your request and filed an appeal, No. [REDACTED]. DCMA responded to your appeal on [REDACTED] and affirmed its action on your request. You dispute this response.

To learn more about DCMA's action on your request, we contacted DCMA FOIA Public Liaison Karen M. O'Neal. Ms. O'Neal noted that DCMA conducted a line-by-line review of the responsive records and released the non-exempt portions. Ms. O'Neal stated that DCMA is firm in its position that its response to your request was proper. In cases 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

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-product privilege, the attorney-client privilege and the deliberative process privilege. DCMA 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, courts more broadly interpret it to include the entire deliberative process, whether or not a specific agency policy decision was at issue.

Agencies invoke Exemption 5’s deliberative process privilege to withhold pre-decisional and deliberative documents. As the agency explained in response to your appeal, DCMA invoked Exemption 5 to protect opinions, recommendations and supervisory observations in the written statement, which were part of the agency’s overall decision-making process concerning an assessment of [REDACTED]. The statement was generated during the assessment and review process, before the adoption of an agency policy or decision concerning [REDACTED].

Exemption 5 allows an agency to make discretionary releases of information in some circumstances; however, DCMA maintains that granting a discretionary release in response to your request would potentially chill the agency’s deliberative process. Courts have held that agencies can properly protect records if their release might harm the ability to freely communicate regarding agency decisions.

Regarding your request for access to information from DCMA particularly as it relates to the [REDACTED] and as part of the litigation process, please know that FOIA and discovery provide entirely different processes for obtaining information from the Federal government. FOIA provides a general right of public access to records, while discovery offers a tool used during litigation to obtain information, usually from an opposing party. While a requester may use FOIA in conjunction with discovery, federal courts have “well established that a FOIA requester cannot rely upon his status as a private party litigant – in either civil or criminal litigation – to claim an entitlement to a greater FOIA access than would be available to the average requester.” (Department of Justice FOIA Update, Vol. VI, No. 3, 1985, http://www.justice.gov/oip/foia_updates/Vol_VI_3/page5.htm).

I note your concern that the records that DCMA released to you contained misstatements and inaccuracies. The Privacy Act of 1974 (Privacy Act) grants U.S. citizens and lawful permanent residents access to their own records that are maintained by the federal government in a “system of records.” The Privacy Act also allows individuals the right to amend or correct records that are not accurate, timely or complete unless the records have been exempted specifically from the Privacy Act amendment procedures.

As the FOIA ombudsman, Privacy Act matters are beyond OGIS’s jurisdiction; however, we are glad to suggest next steps you may wish to consider to resolve your concerns. If you wish to amend or correct your records, you must write to the Privacy Officer in the agency or component that maintains the record and follow the procedures listed in the Department of Defense’s

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Privacy Act regulations, 32 CFR 310, which are available online at <http://www.gpo.gov/fdsys/pkg/CFR-2011-title32-vol2/pdf/CFR-2011-title32-vol2-part310.pdf>. 32 CFR § 310.19 addresses the amendment of records.

For more information on the Privacy Act, you may wish to consult DoD 5400.11-R, the Department of Defense Privacy Act Program (May 14, 2007) which is available online at <http://www.dtic.mil/whs/directives/corres/pdf/540011r.pdf>.

I hope you find this information useful in understanding why DCMA responded to your request as it did. Thank you for contacting OGIS; we will now consider this matter closed.

Sincerely,

Nikki Gramian, Acting Director
Office of Government Information Services

cc: Karen M. O'Neal, FOIA Public Liaison, Defense Contract Management Agency, via email