



OFFICE of GOVERNMENT INFORMATION SERVICES

April 29, 2016 - Sent via e-mail

[REDACTED]  
[REDACTED]

In Re: Case No.: 201600627  
NG: HK

Dear [REDACTED]:

NATIONAL  
ARCHIVES  
and RECORDS  
ADMINISTRATION

8601 ADELPHI ROAD  
OGIS

COLLEGE PARK, MD  
20740-6001

web: [www.ogis.archives.gov](http://www.ogis.archives.gov)

e-mail: [ogis@nara.gov](mailto:ogis@nara.gov)

phone: 202-741-5770

toll-free: 1-877-684-6448

fax: 202-741-5769

This responds to your March 3, 2016 request for assistance to the Office of Government Information Services (OGIS), pertaining to your Freedom of Information Act (FOIA) request to the Central Intelligence Agency (CIA). Thank you for contacting OGIS.

Congress created OGIS to complement existing Freedom of Information Act (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.

We carefully reviewed your request for assistance, and understand that you submitted a request for records [REDACTED]. In response, CIA neither confirmed nor denied the existence or nonexistence of records responsive to your request. According to the CIA, the fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended, and section 102A(i)(1) of the National Security Act of 1947, as amended. CIA denied your request pursuant to FOIA exemptions (b)(1) and (b)(3), 5 U.S.C. § 552(b)(1) and (b)(3).

You appealed CIA's decision and the decision was upheld. You reached out to OGIS for assistance concerning the records you requested. You believe Exemption 1 and 3 would not cover the information you requested. Specifically, you ask OGIS to focus on specific records pertaining to [REDACTED] which do not contain sensitive information and you assert that much of the information can be provided in part with certain information redacted.

In response to your submission, OGIS staff contacted CIA to discuss your request. CIA reaffirmed that they can neither confirm nor deny the existence or non-existence of the records you are seeking and therefore are unable to provide additional information. In situations like this when an agency is firm in its position, there is



NATIONAL  
ARCHIVES

little for OGIS to do beyond providing more information regarding the agency's response and the FOIA exemptions the agency cited in its final response letter.

As you may be aware, FOIA provides for disclosure of many agency records. At the same time Congress included in the FOIA nine exemptions from disclosure that provide protection for important interests such as national security, personal privacy, privileged communication, and certain law enforcement activities.

FOIA Exemption 1 protects from disclosure information that has been deemed classified pursuant to an executive order. Records exempt from release pursuant to Exemption 1 may cause harm to national security and are generally deemed properly classified. In the Exemption 1 context, intelligence agencies often issue "Glomar" responses to FOIA requests in which they refuse to confirm or deny whether responsive records exist. Courts have held that agencies may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would result in a cognizable harm under a FOIA exemption. In your case, the CIA cites Executive Order (EO) 13526, which provides that agencies may issue Glomar responses "whenever the existence or nonexistence of the information itself is classified under this EO or its predecessors." See E.O. 13526 § 3.6(a).

FOIA Exemption 3, 5 U.S.C. § 552(b)(3), incorporates other, separate statutes that require information to be withheld from release. In order to use Exemption 3 to withhold information, an agency must first establish that a particular statute is a non-disclosure statute and that the particular criteria for withholding information are in the actual words of the statute, not in the legislative history of the withholding statute.

Exemption 3 of FOIA establishes two categories of statutes—those that provide agencies with no discretion for withholding information and those that provide agencies with some discretion by establishing particular criteria or referring to particular types of matters. See 5 U.S.C. §§ 552(b)(3)(A) and (B). In other words, the discretion to release information potentially covered by Exemption 3 is not governed by FOIA, but by the withholding statute itself.

In your case, 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).

It can be very challenging to pierce an agency's Glomar response, particularly when it is related to classified (FOIA Exemption 1) matters. One way to show that a Glomar response is not proper is to provide evidence that an official of the agency has publicly and officially acknowledged a fact that would establish a basis for concluding that records about a subject exist (or existed). Please note that the agency will not accept a report by a news organization because the news article does not equate to

confirmation of information or a fact by a government official. Also as a general rule, the public's interest in a topic is not factored into an agency's decision in matters related to classified material or that which is exempt pursuant to a withholding statute. If you can find some official acknowledgment about the matters you referenced in your request to CIA, you may wish to present this material to the agency with another request.

I hope you find this information useful in understanding why the CIA responded to your request as it did. At this time, there is no further assistance OGIS can offer and we will close your case. Thank you for bringing this matter to OGIS.

Sincerely,

/s/

JAMES V.M.L. HOLZER  
Director

cc: CIA FOIA

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.