



OFFICE of GOVERNMENT INFORMATION SERVICES

July 8, 2013— Sent via U.S. Mail



Re: Case No.: 201300531  
MN: CZ: KM

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

Dear Mr. [REDACTED]:

This responds to your May 10, 2013 request for assistance from the Office of Government Information Services (OGIS), which we received on May 14, 2013 via U.S. mail. Your request for assistance pertains to your Freedom of Information Act (FOIA) request, No. [REDACTED], to the Antitrust Division, Department of Justice (DOJ), seeking access to records pertaining to a joint investigation of business practices of [REDACTED] industry by the Antitrust Division's Chicago Field Office and the U.S. Department of Agriculture's Grain Inspectors, Packers and Stockyard Administration (GIPSA).

Congress created OGIS to serve as the Federal FOIA Ombudsman and its jurisdiction is limited to assisting with the FOIA process.

OGIS:

- Advocates for neither the requester nor the agency, but for the FOIA process to work as intended
- Provides mediation services to help resolve disputes between FOIA requesters and Federal agencies
- Strives to work in conjunction with the existing request and appeal process
- May become involved at any point in the FOIA administrative process

OGIS does not:

- Compel agencies to release documents
- Enforce FOIA
- Process requests or review appeals
- Provide assistance outside the realm of FOIA
- Make determinations or dictate resolutions to disputes



OGIS Facilitator Kirsten Mitchell carefully reviewed the correspondence you submitted and discussed your case with Sue Ann Slates, chief of the FOIA/Privacy Act Unit at the Antitrust Division. As you may know, there are nine broad categories of information that are exempt from release under FOIA. In response to your request, the Antitrust Division cited four FOIA exemptions

██████████  
July 8, 2013

Page 2 of 3

to withhold information from release. I note that the Office of Information Policy (OIP) affirmed the Antitrust Division's use of three of these four exemptions in response to Appeal No. ██████ - ██████. OGIS discussed the exemptions with Ms. Slates to learn more about the types of documents the agency withheld and why.

FOIA Exemption 5, 5 U.S.C. § 552(b)(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 common legal privileges: the attorney work-product privilege, the attorney-client privilege and the deliberative process privilege. The Antitrust Division cited the attorney work-product privilege provision of Exemption 5.

The attorney work-product privilege protects documents prepared by an attorney contemplating litigation. That privilege applies when there is at least "some articulable claim, likely to lead to litigation." *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 865 (D.C. Cir. 1980). Even if litigation is not filed, Exemption 5 can still apply. The U.S. Court of Appeals for the District of Columbia ruled that the privilege "extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated." *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992).

We learned from the agency that in your case, the responsive documents on which Exemption 5 was taken consisted of internal memoranda and communications created during an investigation by an Antitrust Division attorney with help from a GIPSA legal specialist.

As you may know, Attorney General Eric Holder, in a March 19, 2009 memorandum, strongly encouraged agencies to make discretionary disclosures of information, <http://www.justice.gov/ag/foia-memo-march2009.pdf>. We learned that the agency did not grant a discretionary release in response to your request because it found that certain information in the documents would reveal legal theories, evidence, scope of the investigation and the direction of the investigation.

We learned from the Antitrust Division that although Exemption 5 shielded the responsive documents their entirety, three other exemptions also applied to material within those documents, Exemptions 4, 7(C) and 7(D).

Exemption 7 is a multi-part law enforcement exemption. In order to apply any of the Exemption 7 sub-parts to a record, that record must meet the threshold requirement that it was compiled for law enforcement purposes.

Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), states that records compiled for law enforcement purposes, such as investigations conducted by regulatory agencies such as GIPSA and the Antitrust Division, may be withheld if they "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), broadly protects all information shared with criminal law enforcement agencies by confidential sources in criminal investigations. *See Reiter v. DEA*, No. 96-0378, 1997 WL 470108 (D.D.C. Aug. 13, 1997). The use of the exemption hinges on the

[REDACTED]  
July 8, 2013

Page 3 of 3

circumstances under which the information is provided. Unlike other exemptions to FOIA, which require a balancing of public and private interests, Exemption 7(D) does not require such a balancing test. If a source is confidential, the exemption may be invoked regardless of the public interest in disclosure. *See Jones v. FBI*, 41 F.3d 247 (6<sup>th</sup> Cir. 1994).

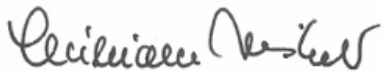
We learned from the Antitrust Division that the agency used Exemptions 7(C) and 7(D) to withhold the names of and identifying information about confidential sources, the information those exemptions were created to protect.

Exemption 4, 5 U.S.C. § 552(b)(4), protects “trade secrets or commercial or financial information obtained from a person [that is] privileged or confidential.” The exemption protects persons, defined to include corporations, who provide commercial or financial information to the Government by insulating them from competitive disadvantages that might result from disclosure. In your case, the Antitrust Division cited Exemption 4 to protect certain confidential business information about [REDACTED]. However, OIP, which carefully reviewed your request during the appeal process, did not affirm the agency’s use of Exemption 4. We learned that removing the protection of Exemption 4 does not make the information releasable under FOIA because the information is exempt under Exemption 5.

I hope you find this information useful in understanding why the Antitrust Division withheld the material it did in response to your request. After reviewing the agency’s actions, it appears that your request was processed in accordance with FOIA law and policy.

At this time, there is no further assistance OGIS can offer. Thank you for bringing this matter to OGIS. We will close your case.

Sincerely,



Miriam Nisbet, Director  
Office of Government Information Services (OGIS)

cc: Sue Ann Slates, chief, FOIA/Privacy Unit, Antitrust Division, DOJ

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.