



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS
SEATTLE OFFICE

April 17, 2012

Via E-Mail Only: gwen.florio@missoulain.com

Ms. Gwen Florio
Cops & Courts Reporter
The Missoulian
P.O. Box 8029
Missoula, Montana 59807

Re: Freedom of Information Act (FOIA), FOIA No. 12-01042-F
University of Montana - Missoula

Dear Ms. Florio:

In your e-mail of March 21, 2012, to the Seattle office of the Office for Civil Rights (OCR) in the U.S. Department of Education, you requested **copies of 1) notification letters sent to the University and 2) complaint forms filed in cases alleging sex discrimination, sexual harassment, or sexual assault against the University of Montana-Missoula since December 2010**. Your request is being processed under FOIA (5 U.S.C. §552).

Following a thorough search, we found no records responsive to your request No. 1, above. With regard to request No. 2, above, we have located four pages responsive; however, each page contains portions that must be redacted as discussed below. Therefore, your request is granted in part and denied in part.

The records you requested are part of the OCR system of records. They are records from open complaint files compiled by OCR to determine whether a recipient of funds from the Department has violated a civil rights law enforced by OCR. OCR's response to your request is governed by the FOIA, 5 U.S.C. §552, which requires federal agencies to release records, on request, except where such records or parts of records are determined to be exempt from public disclosure or qualify for one or more of nine statutory FOIA exemptions. The FOIA provides, in part, that:

“(b) this section [of the FOIA which otherwise mandates release of records responsive to a request] does not apply to matters that are -- ...

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information...

(A) could reasonably be expected to interfere with enforcement proceedings...and

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(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy...

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

- OCR is redacting portions of two pages pursuant to 5 U.S.C. § 552(b)(7)(A). The release of this information could hamper future law enforcement activities as this case remains open before OCR.
- OCR is redacting portions of four pages pursuant to 5 U.S.C. § 552(b)(7)(C). We have determined that the release of this information would provide personal, private information such as name, home address, phone number, etc. of private party individuals.

Exemption (b)(7)(A)

The exemptions contained in Section (b)(7) require as a threshold that the withheld documents be compiled for a law enforcement purpose. Section (b)(7)(A) applies when: (1) a law enforcement proceeding is pending or prospective, and (2) the disclosure of information about it could reasonably be expected to cause some articulable harm. See Crooker v. Bureau of Alcohol, Tobacco & Firearms, 789 F. 2d 64, 65-67 (D.C. Cir. 1986). In John Doe Agency v. John Doe Corp., 110 S.Ct. 471 (1989), the Supreme Court held that Exemption 7 does not require the requested documents be originally compiled for a law enforcement purpose but, rather, that they were compiled for a law enforcement purpose "when the response to the FOIA request must be made." See 110 S.Ct. at 477.

In this instance, the requested documents are from investigatory files in an active case generated by a complaint alleging a violation of a civil rights statute that OCR is charged with enforcing. As such, the documents are clearly records, which were "compiled for law enforcement purposes."

The portions of the documents that are deniable under Exemption 7(A) were submitted as part of a complaint filed against a recipient. The documents are contained in the investigatory files of an open case regarding alleged violations of civil rights statutes. In the event the recipient is found to be in violation of a civil rights statute and does not develop acceptable remedial plans, OCR will be required to initiate enforcement action against this recipient. Since the complaint has not been resolved, the records contained in the investigatory files are part of active cases where enforcement proceedings are "pending or contemplated."

Exemption 7(A)(1) requires that an enforcement proceeding be pending or contemplated and imposes no requirement that an investigation be ongoing. Thus, Exemption 7(A) may be invoked when an investigation has terminated, but an agency retains oversight or some other continuous enforcement-related responsibility. See, e.g., Crooker, *supra*. However, the related enforcement proceeding must be a concrete possibility rather than a mere hypothetical one. See Badran v. Dept. of Justice, 652 F. Supp. 1437, 1440 (E.D. Wis. 1987).

In reference to the second prong of Exemption 7(A), the Seventh Circuit, invoking the language of Justice Marshall in NLRB v. Robbins Tire, 437 U.S. 214, 236 (1978), has stated that "the government need not establish that release of the document would actually interfere with an enforcement proceeding." Wright v. Occupational Safety and Health Administration, 822 F. 2d 642 (7th Cir. 1987). See also Lewis v. Internal Revenue Service, 823 F. 2d 375 (9th Cir. 1987). "Instead, the Government need show only 'that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings.'" Wright, *supra*.

In Wright, the Seventh Circuit held a file prepared by the Occupational Safety and Health Administration in its investigation of a fire and explosion at an oil company could be withheld on the grounds that "it would tip off the company as to the 'scope of the investigation, its direction, limits and types and sources of information relied upon.'" Quoting the Supreme Court in Robbins Tire, the Seventh Circuit wrote that "(p)ublic disclosure might also enable the company 'to construct defenses, possibly tamper with potential evidence and otherwise employ measures to frustrate the enforcement proceeding.'" Wright, *supra*.

The purpose of OCR's investigation is to establish what happened and to assess whether, based on the facts identified, a violation of law occurred. Premature disclosure of certain information regarding the events in question could hamper OCR's investigation and resolution of the subject complaint. If investigative information is released to a requestor prior to resolution, the release of this information would reveal important aspects of OCR's investigative strategy. Additionally, OCR anticipates that the parties could alter their positions based on the contents of the information included in the case file to date, which could impede OCR's ability to obtain an objective and accurate understanding of the facts. For these reasons, as in the situation addressed in the Wright case, release of the information in question could lead to the construction of defenses, modification of testimony, or similar efforts to frustrate enforcement proceedings.

OCR has determined that the release of this information could potentially hamper OCR's investigation and law enforcement efforts with regard to this case.

Exemption (b)(7)(C)

It is OCR's position that portions of the requested records may be withheld under Exemption (7)(C) of the FOIA. See 5 U.S.C. 552(b)(7)(C). These provisions exempt from disclosure "... records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy..."

Portions of the requested documents that reveal the name and other personally identifiable information of private party individuals may be withheld in reliance on Exemption (b)(7)(C)'s protection for personal privacy interests. To support this exemption, OCR must show that the documents were compiled for law enforcement purposes. The requested documents are part of investigatory files in cases generated by complaints alleging violations of a civil rights statute that OCR is charged with enforcing and, as such, are clearly records, which were compiled for law enforcement purposes.

The second component to the (7)(C) exemption requires a balance of interests test first used by the U.S. Supreme Court in the context of Exemption 6, which permits the withholding of information about individuals in personnel, medical, and similar files. See Dept. of Air Force v. Rose, 425 U.S. 352, 370-73 (1976). Subsequently, the courts have applied this balancing process to the (7)(C) exemption. See Baez v. U.S. Dept. of Justice, 647 F. 2d 1328, 1338 (D.C. Cir. 1980); Miller v. Webster, 483 F. Supp. 883, 887 (N.D. Ill. 1979).

This "balance of interests test" was articulated in Funds for Constitutional Government v. National Archives and Record Service, 656 F. 2d 856, 862 (D.C. Cir. 1981):

While the dominant objective of the FOIA is disclosure, Congress has made a considered judgment that under certain circumstances the public's right of access to governmental information should yield to the legitimate interest in personal privacy of individuals about whom the government maintains information for any variety of purposes. This Congressional judgment is embodied in FOIA Exemptions (7)(C) and 6, both of which provide an exemption from the Act's mandatory disclosure requirement for information which, if released, could result in "an unwarranted invasion of personal privacy." In determining the applicability of both, the court must undertake a balancing of the public interest in disclosure on the one side and the individual's interest in privacy on the other. (Citations omitted.)

Thus, once it is established that a personal privacy interest is implicated, the next inquiry is whether there are any countervailing factors that warrant an invasion of that interest. See Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). Whether disclosure of private documents is warranted depends on the relationship of the requested material to the basic purpose of the FOIA to expose agency action to public scrutiny, rather than on the particular purpose for which the document is being requested.

See Reporters Committee, 489 U.S. at 772 (quoting Dept. of Air Force v. Rose, 425 U.S. at 372). In affirming the withholding of an individual's conviction record, the Supreme Court in Reporters Committee noted that "Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." See Reporters Committee, 489 U.S. at 772.

The requested document includes the name and other personally identifiable information of private individuals. In assessing whether to release this information, OCR must determine whether its release to the public domain is warranted based on the balancing of the general public's interest in the information and the privacy interest of individuals. Since release of this type of information would reveal little or no information about the performance of OCR in carrying out its investigative and enforcement functions in these cases or in general, the public's interest in such information does not warrant the invasion of the privacy of the individuals referenced above and should be withheld.

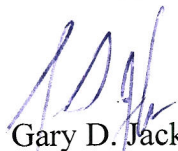
You have the right to appeal this determination by writing, within 35 days of your receipt of this letter, to:

Assistant Secretary for Management
Office of Management
U.S. Department of Education
400 Maryland Avenue, SW, Room 2W311, LBJ
Washington, DC 20202-4500
ATTN: FOIA Appeals.

Your appeal should be accompanied by a copy of your initial request and this denial letter, and should contain any evidence or argument you wish the Department to consider in making an administrative determination on your appeal.

If you have questions regarding this letter, please contact Tania Lopez at (206) 607-1623 or by e-mail at tania.lopez@ed.gov.

Sincerely,



Gary D. Jackson
Regional FOIA Officer
Seattle Office

Enclosures