



U.S. Customs and
Border Protection

AUG 25 2014

DIS-3 OT:RR:RDL:FAPL
CBP-AP-2014-039466 EAC

Mr. George W. Maschke
Van Trigtstraat 53
2597 VX The Hague
The Netherlands

Re: Freedom of Information Act Appeal of File No. CBP-2014-000006

Dear Mr. Maschke:

This is in reply to your letter dated July 15, 2014, to U.S. Customs and Border Protection ("CBP") in which you appeal the response you received from the CBP FOIA Division to your Freedom of Information Act ("FOIA") (5 U.S.C. § 552) request for certain CBP records. In this regard, you specifically requested "an electronic copy of the PowerPoint presentation presented by U.S. Customs and Border Protection Special Agent John Schwartz at the American Association of Police Polygraphists's meeting on June 3, 2013, at the Omni Charlotte Hotel in Charlotte, North Carolina." In response to your request, the FOIA Division stated that any responsive records were part of an open and pending investigation and, therefore, should be withheld in their entirety. You appeal this response, noting that the PowerPoint file was presented at an event that any member of the public could attend.

In order to process your appeal, we have contacted the CBP Office of Internal Affairs ("OIA") to search for responsive records. This search by OIA has produced a 15-page PowerPoint presentation that is responsive to your request.¹ However, upon review we have determined that the 15-page presentation is properly withheld from disclosure pursuant to FOIA Exemptions (b)(7)(A) and (b)(7)(E) (5 U.S.C. §§ 552 (b)(7)(A) and (b)(7)(E)). In making this determination, we initially note that OIA has stated that it was their understanding that the event was not an event that any member of the public could attend. Furthermore, while the PowerPoint presentation may have been displayed briefly in a limited and controlled environment there was no official disclosure that allowed the document to enter the public domain and be preserved in a permanent public record. See, for example, Students Against Genocide v. Dep't of State, 257 F. 3d 828, 836 (D.C. Cir. 2001) (emphasizing that "[f]or the public domain doctrine to apply, the specific information sought must have already been 'disclosed and preserved in a permanent public record'" (citing, Cottone v. Reno, 193 F. 3d 550, 554-55 (D.C. Cir. 1999)); Am. Lawyer Media v. SEC, 2002 U.S. Dist. LEXIS 16940, at *4 (D.D.C. Sept. 6, 2002) (holding that agency did not waive right to withhold portions of training manual by permitting plaintiff's employee to review manual during public training conference because plaintiff had not shown that manual is in public domain). Having

¹ Each page contains only one "slide" from the PowerPoint presentation.

determined that the PowerPoint presentation has not already been officially entered into the public domain, a discussion of how we applied FOIA Exemptions (b)(7)(A) and (b)(7)(E) to withhold the records from disclosure follows.

The FOIA "was enacted to facilitate public access to Government documents." U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991). The predominant objective of the FOIA is the disclosure of executive branch information that is maintained by the Federal Government to the public unless the requested records contain certain categories of information that are exempt or excluded from compelled disclosure. FOIA provides nine exemptions and three exclusions pursuant to which an agency may withhold requested information. Thus, the public's right to government information is not without limits. However, FOIA exemptions are to be narrowly construed, and the burden is on the government to demonstrate that the materials sought may be withheld due to one or more of the exemptions. In any event, the FOIA provides that any non-exempt information that is reasonably segregable from the requested records must be disclosed. The segregability requirement limits claims of exemption to discrete units of information; to withhold an entire document, all units of information in that document must fall within a statutory exemption. See, Trans-Pacific Policing Agreement v. U.S. Customs Serv., 177 F. 3d 1022, 1027 (D.C. Cir. 1999).

Exemption (b)(7)(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." See, 5 U.S.C. § 552 (b)(7)(A). In this case, Exemption (b)(7)(A) has been applied to withhold from disclosure a 15-page PowerPoint presentation. The documents are considered law enforcement records because they relate to the CBP polygraph examinations which are administered as part of the background investigation process. However, we also note that determining the applicability of Exemption (b)(7)(A) requires a two-step analysis focusing on: (1) whether a law enforcement proceeding is pending or prospective, and (2) whether release of information about it could reasonably be expected to cause some articulable harm. In order to satisfy the "pending/prospective" requirement of Exemption (b)(7)(A), an agency must be able to point to a specific pending or contemplated law enforcement proceeding. The types of "law enforcement proceedings" to which Exemption (b)(7)(A) may be applicable have been interpreted broadly by the courts to include criminal actions, civil actions, and regulatory and administrative proceedings. In this case, the first prong is met because the withheld documents relate to a current Department of Homeland Security, Office of Inspector General ("DHS OIG") investigation.

Having met the first prong of the two-part analysis for Exemption (b)(7)(A), we must next consider whether release of the information could reasonably be expected to cause some articulable harm. A detailed showing that release of the records is likely to interfere with law enforcement proceedings is not required. Rather, it is sufficient for an agency to make a generalized showing that release of these particular kinds of documents would generally interfere with enforcement proceedings. The courts have long accepted that Congress intended that Exemption (b)(7)(A) apply "whenever the government's case in court would be harmed by the premature release of evidence or information." Radcliffe v. IRS, 536 F. Supp. 2d 423, 437-38 (S.D.N.Y. 2008) (explaining that "even if matter proceeds to trial," agency has

established that releasing records of offshore credit card accounts would interfere with enforcement proceedings by providing earlier access and "exact contents" of agency documents); Stolt-Nielsen Trans. Group, Ltd. v. DOJ, 480 F. Supp. 2d 166, 180 (D.D.C. 2007) (noting that release of information "would provide potential witnesses with insights into the Division's strategy and the strength of its position"); Suzhou Yuanda Enter. Co. v. Customs and Border Prot., 404 F. Supp. 2d 9, 14 (D.D.C. 2005) (agreeing that release of information "would interfere with an agency investigation [by] informing the public of the evidence sought and scrutinized by this type of investigation"); Envtl. Prot. Servs. v. EPA, 364 F. Supp. 2d 575, 588 (N.D. W. Va. 2005) (explaining that disclosure "would prematurely reveal the EPA's case"); Judicial Watch v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 179 (D.D.C. 2004) (finding that release of agent notes and information concerning export violations could "reasonably be expected to interfere" with proceedings). Interference has also been established when release of information could undermine the effectiveness of an agency's investigation. See, for example, Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 119 (D.D.C. 2005). In addition, it has been recognized that releasing documents during the course of an investigation could damage an agency's ability to obtain information. See, for example, Judicial Watch v. DOJ, 306 F. Supp. 2d 58, 75-76 (D.D.C. 2004).

As applied, the second prong of the two-step analysis for Exemption (b)(7)(A) is also met in this case because disclosure of the information in the PowerPoint presentation could interfere with DHS OIG's investigation by damaging their ability to obtain information by revealing nature, scope, and direction of the ongoing investigation. Since releasing the PowerPoint presentation could very well jeopardize the ongoing investigation by revealing investigative strategy, we find that the presentation documents are properly withheld from disclosure pursuant to Exemption (b)(7)(A).

Exemption (b)(7)(E) exempts from disclosure information that would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. See, Fisher v. U.S. Dep't of Justice, 772 F. Supp. 7 (D.D.C. 1991) (explicitly recognizing categorical protection for law enforcement techniques and procedures), aff'd, 968 F.2d 92 (1992); and, Hammes v. U.S. Customs Service, 1994 WL 693717 (S.D.N.Y. 1994) (protecting criteria used to determine which passengers to stop and examine). Exemption (b)(7)(E) is designed to provide categorical protection for law enforcement techniques and procedures. See, Beck v. U.S. Dep't of the Treasury, No. 88-493 (D.D.C. 1989), aff'd, 949 F.2d 1563 (D.C. Cir. 1992) (approving nondisclosure of certain documents because disclosure would reveal surveillance techniques used by Customs, as well as why certain individuals were contacted with regard to investigations).

In this case, Exemption (b)(7)(E) has also been applied to withhold the 15-page PowerPoint presentation from disclosure in order to protect sensitive law enforcement information relating to CBP's polygraph examinations. In this respect, we note that the documents contain specific information pertaining to countermeasures that the employed by CBP applicants to undermine the effectiveness of the examinations. In addition, the documents contain information about the strategies that CBP utilizes to detect such

countermeasure activity. Releasing the information in the presentation would provide a blueprint to CBP polygraph examiner strategies, reveal specific investigative techniques, and enable individuals to attempt to develop examination countermeasures thereby circumventing the law. Therefore, the 15-page PowerPoint presentation is also properly withheld from disclosure pursuant to FOIA Exemption (b)(7)(E).

The Freedom of Information Act, particularly Title 5 U.S.C. § 552 (a)(4)(B), provides you with the opportunity to seek judicial review of this administrative appeal. You may institute judicial review in the United States District Court in the district in which you reside, have a principal place of business, where the agency records are located, or in the United States District Court for 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. You may contact OGIS in any of the following ways:

Office of Government Information Services
800 N. Capitol Street, Suite 795
Washington, DC 20002

Telephone: 202-741-5770
Facsimile: 202-741-5769
www.archives.gov/ogis

Sincerely,



Shari Suzuki, Chief
FOIA Appeals, Policy, and Litigation
Regulations and Rulings
Office of International Trade