

April 27, 2015

Dear Irvin Muchnick:

This is in response to your Freedom of Information Act/Privacy Act (FOIA/PA) request received in this office February 10, 2015 regarding the visa and green card files of George Gibney.

We have completed the review of all documents and have identified 102 pages that are responsive to your request. Enclosed are four pages released in their entirety. We are withholding 98 pages in full. In our review of these pages, we have determined that they contain no reasonably segregable portion(s) of non-exempt information. We have reviewed and have determined to release all information except those portions that are exempt pursuant to 5 U.S.C. § 552 (b)(6), (b)(7)(C), and (b)(7)(E) of the FOIA.

- Exemption (b)(6) permits the government to withhold all information about individuals in personnel, medical and similar files where the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. The types of documents and/or information we have withheld may consist of birth certificates, naturalization certificates, drivers' licenses, social security numbers, home addresses, dates of birth, or various other documents and/or information belonging to a third party that are considered personal.
- Exemption (b)(7)(C) provides protection for personal information in law enforcement records, which could reasonably be expected to constitute an unwarranted invasion of personal privacy. We have withheld information relating to third-party individuals. The types of documents and/or information we have withheld could consist of names, addresses, identification numbers, telephone numbers, fax numbers, or various other documents that are considered personal.
- Exemption (b)(7)(E) provides protection for records or information for law enforcement purposes which 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. The types of documents and/or information we have withheld could consist of law enforcement systems checks, manuals, checkpoint locations, surveillance techniques, and various other documents.

[...]

Sincerely,

Jill A. Eggleston

Director, FOIA Operations
May 21, 2015

Dear Ms. Eggleston:

Introduction

This is a Freedom of Information Act appeal, case number COW2015000101, per your letter of April 27, 2015. The hard-copy version of this letter, to your Lee's Summit physical address, encloses a reproduction of the CD containing PDF files of your response letter and document production ("Response").

I am consulting with attorneys for a prospective appeal to federal court. I submit this administrative appeal, based on my reading of evident logistical contradictions in the Response. I beg the indulgence of your office of possible shortcomings in legal rigor or format.

This letter is being copied to:

- Homeland Security Secretary Jeh Johnson;
- USCIS Director Leon Rodriguez;
- Senator Dianne Feinstein and Congresswoman Jackie Speier, both of California, who are monitoring the issue of sexual abuse in amateur sports; and
- The Honorable Maureen O'Sullivan, a representative of the Oireachtas (Parliament of the Republic of Ireland), who is leading the effort there to revisit the criminal prosecution, and seek the extradition from the United States, of George Gibney, whose visa and green card files are the subject of this FOIA request.

The success of a FOIA request turns not on the motivations behind the request, but rather on whether it legitimately contributes to the citizenry's better understanding of the processes of their federal government. Having said that, I do hope USCIS considers my appeal with an awareness that many people, both in the United States and abroad, have expressed interest in a just outcome.

1.

Privacy considerations are not absolute under FOIA law.

In the 2014 case *Union Leader Corporation v. U.S. Dep't of Homeland Security, et al.*, 749 F.3d 45, the 1st Circuit Court of Appeals held that a FOIA exemption for records or

information compiled for law enforcement purposes did not apply to a newspaper's request. "[T]he government agency bears the burden of proving the applicability of a specific statutory exemption; that burden remains with the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document." In determining whether a privacy exemption applies to "records or information compiled for law enforcement purposes, courts must balance the implicated privacy interest against the public interest in releasing the materials." Here "the public interest in enabling the newspaper to investigate public records pertaining to the aliens' prior convictions and arrests ... outweighed the aliens' attenuated privacy interests."

The identical principle applies in my FOIA appeal.

2.

The Response makes the unsupported assertion that non-exempt information cannot be reasonably segregated.

The Response states that "we have determined that [the 98 withheld pages] contain no reasonably segregable portion(s) of non-exempt information." However, as I develop below, such an assertion is clearly undermined elsewhere in the Response.

As a result of this doubt, I submit that the assertion of blanket withheld pages (rather than appropriately targeted redactions) is the proper jurisdiction of the federal courts. Accordingly, I contemplate a judicial appeal for inspection of the pages independently and *in camera*. A judicial appeal is moot if USCIS chooses, as a resolution of this administrative appeal, to reverse the Response's blanket withholding of pages.

Even before getting to the argument below with respect to the Response's explanation of the application of Exemption (b)(7)(c), and how that explanation itself contradicts the concept of inability to segregate exempt from non-exempt information, it is simply not intuitive that "no" reasonably segregable portion(s) of non-exempt information exist in *any* of the 98 (out of a total of 102) withheld pages. For example, the Response, at page 19 of the PDF attachment, includes a fully produced page, which is a generic instruction page. The Response stretches credulity by suggesting that not even one of the 98 withheld pages contains similar government forms and paperwork, which, even in redacted form, would provide useful public insight into how USCIS processed the attendant visa and green card applications.

Further, the Response's listing of Exemptions (b)(7)(c) and (b)(7)(e), in addition to Exemption (b)(6), already concedes that the files contain law enforcement records. There is keen public interest in knowing that Gibney was approved for a visa and/or a green card in the face of such records. Those records should be produced with responsible redactions, not with blanket withholding of the pages. USCIS is not itself a police agency; the law enforcement records on Gibney that came into the possession of USCIS were assembled in the course of the immigration process – *i.e.*, visa and/or green card applications.

In no obvious way is the Response either judicious or in keeping with the spirit of FOIA with its all-or-nothing approach to redactions. For example, the public has a right to learn whether a resident alien's original visa was obtained by lottery or by other means. *Prima facie*, visa renewals and green card applications would include letters endorsing the applicant's professional or other qualifications as a component of his request to remain in this country. The underlying contents of such sponsorship documents are public records, even if personal identifying information therein is redactable.

Finally, the very existence of pages giving rise to claims of exemptions because they are law enforcement records supports the notion that those pages should have limited access for the public in the context of scrutinizing the work of the immigration and citizenship agency. To make this argument is not to say that the existence of law enforcement record references to a visa or green card applicant automatically disqualifies said applicant. However, this does obliterate the diametrically opposite notion of the Response: that such records can be legally withheld *in total*, with no discernible effort to segregate and disclose non-exempt information. (This point is only underscored by the three other fully released pages of the Gibney file: pages 71-73, representing the government's retention of documentation of sexual abuse allegations against Gibney in Ireland, as publicized by the organization One Child International.)

3.

Exemption (b)(7)(c) and the explanation of "third-party references" combine to establish the viability of segregating elements of the withheld pages.

The argument against the fully withheld pages becomes sharper still with the explanation in the Response of the statutory exemptions that were applied.

The Response's explanation of the second of the three bulleted exemptions states:

"Exemption (b)(7)(C) provides protection for personal information in law enforcement records, which could reasonably be expected to constitute an unwarranted invasion of personal privacy. *We have withheld information relating to third-party individuals.* The types of documents and/or information we have withheld could consist of names, addresses, identification numbers, telephone numbers, fax numbers, or various other documents that are considered personal." (italics added)

From the wording of the Response, it appears that pages withheld under (b)(7)(c) contain *both* personal identifying information of third-party individuals *and separately* – by definition – personal identifying information of George Gibney himself. (The Gibney information is withheld under a different asserted exemption, (b)(6).)

In my breakdown of the withheld pages, based on my review of the Response's PDF attachment, twenty-seven of the pages are withheld on claims of (b)(7)(c) exemptions. (Fourteen

of the pages claim Exemptions (b)(7)(c) and (b)(6); thirteen others claim all three listed exemptions: (b)(7)(e) as well as (b)(7)(c) and (b)(6.)

Conclusion

For the foregoing reasons, FOIA request COW2015000101 should be modified on appeal so that USCIS performs a new review of the following numbered pages with a view toward removing some or all of the redactions therein:

1, 2, 33, 40, 46, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61 75, 76, 77, 78, 79, 80, 81, 82, 83

Respectfully submitted,

Irvin Muchnick