



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

September 29, 2011

IN REPLY REFER TO
FOIA Appeal No. 2011-107

David Paulides

(b) (6)

Dear Mr. Paulides:

This responds to the May 16, 2011, Freedom of Information Act ("FOIA") appeal ("appeal") (No. 2011-107) that you filed with the Department of the Interior ("Department"). Your appeal concerns the National Park Service's ("NPS") decision to withhold, pursuant to FOIA exemption (7)(A), documents that are responsive to the February 22, 2011, FOIA request that you filed with it seeking 10 categories of documents related to the Yosemite National Park missing person case concerning Stacy Anne Arras.

After fully reviewing the issues presented in the appeal, the Department concludes that the NPS properly invoked exemption (7)(A) as a basis to withhold the documents. Therefore, your appeal is denied.

Exemption (7)(A) permits 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."¹ The exemption is intended to prevent premature disclosure of the investigatory materials that might be used in a law enforcement action.²

In this case, Congress has given the Secretary of the Interior, through the NPS, express law enforcement authority to "maintain law and order and protect persons and property within areas of the National Park System"³ and the records at issue in the appeal were compiled for this purpose. Therefore, the Department concludes that the withheld documents were "compiled for law enforcement purposes."

Additionally, the NPS has advised the Department that its criminal investigation into the incident is still ongoing. Disclosure of the documents at issue in the appeal could reasonably be expected to interfere with enforcement proceedings because their premature release could:

¹ See 5 U.S.C. § 552(b)(7)(A).

² *FBI v. Abramson*, 456 U.S. 615, 621 (1983).

³ See 16 U.S.C. § 1a-6(b).

- Afford a virtual roadmap through the government's evidence, which would provide critical insights into its legal thinking and strategy and could jeopardize the proceedings by more fully revealing the scope and nature of government's case and assist in circumventing investigation;
- Prematurely reveal the full scope of the evidence obtained, the assessment of the evidence, reveal strengths and weaknesses of the NPS's evidence and case, and the progress, status, direction and limits of the NPS's investigation;
- Hinder NPS's ability to further control and shape the investigation, would enable targets of the investigation to elude detection, create defenses, or to suppress, fabricate, or tamper with evidence;
- Create a great potential for witness intimidation, expose actual or prospective witnesses to undue influence or retaliation, could deter their cooperation, and create the potential for interference with them.

Further, a review of the withheld materials reveals that there are no non-exempt categories that can be released to you without causing one of the harms to the NPS's investigation of the incident articulated above. Therefore, based on the foregoing, the Department concludes that the NPS properly withheld the documents at issue in the appeal in their entirety under exemption (7)(A).

As a final matter, you advised the Department that the NPS may have waived its right to invoke an exemption to withhold the materials because it allowed a former Law Enforcement Ranger, Charles Farabee, to view the case file that you seek here. You also advised that Mr. Farabee "wrote a lengthy section in his book about the disappearance of Stacy Arras."

When a requester produces evidence that specific information has officially entered the public domain, the courts have concluded that the government may not rely on an otherwise valid exemption to justify withholding that identified information.⁴ However, please be aware that the release of certain documents waives FOIA exemptions only for those documents or portions of documents that the requester establishes have been released.⁵ Partial disclosures of "the contents of a document does not constitute a waiver

⁴ See *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001) (emphasizing that for a waiver to occur, 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))).

⁵ *Sierra Club v. Kempthorne*, 488 F. Supp. 2d 1188, 1192 (S.D. Ala. 2007) (finding that "any effort" on the part of the Plaintiff to claim that a waiver occurred would be "futile," where the Fish and Wildlife Service withheld materials that are "similar" to documents it previously released to the Plaintiffs. (citing *Florida House of Representatives v. United States Dep't of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992) (refusing to find a waiver as to undisclosed

of the applicable FOIA exemptions for the entire document...Specificity is the touchstone in the waiver inquiry, and thus, neither general discussions of a topic nor partial disclosures of information constitute waiver of an otherwise valid FOIA exemption.”⁶ The burden is on you to establish that the specific record in the public domain duplicates that being withheld.⁷

In this case, you have not met your burden of establishing that a waiver occurred. The section in Mr. Farabee’s book regarding the incident that is the subject of the FOIA request is not “lengthy,” as you describe. Rather, out of the 600-page book, the discussion regarding this incident consists of one and a quarter pages of text and a reference to the incident in a table. The short, general discussion in Mr. Farabee’s book regarding Ms. Arras disappearance does not reflect the detailed information contained in the nearly two thousand pages that comprise the case file that you seek.

documents based on the disclosure of related documents)); *Coastal Delivery Corp. v. United States Customs Serv.*, 272 F. Supp. 2d 958, 966 (C.D. Cal. 2003) (finding that “for Customs to have waived its right to argue exemptions, it must have disclosed the exact information at issue.”); *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 81-82 (D.D.C. 2003) (holding that “selective” disclosure of some withheld material does not waive use of exemptions to protect similar, but undisclosed, information); *Ctr. for Int’l Envtl. Law v. Office of the U.S. Trade Representative*, 237 F. Supp. 2d 17, 23 (D.D.C. 2002) (holding that public availability of “similar but not identical information” does not lead to waiver for all information on same subject); *The Army Times Publishing Co. v. Dep’t of the Air Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993) (finding that an agency does not waive its right to assert an exemption by releasing information that is only similar to the requested material).

⁶ *Bronx Defenders v. United States Dep’t of Homeland Sec.*, 2005 U.S. Dist. LEXIS 33364, 9-10 (S.D. N.Y. Dec. 19, 2005) (citing *Mehl v. United States Environmental Protection Agency*, 797 F. Supp. 43, 47-48 (D.D.C. 1992) (finding that a report that described the contents and quoted several passages of some sought-after documents did not waive exemption for the documents in their entirety); *Dow Jones & Co. v. United States Dep’t of Justice*, 880 F. Supp. 145, 151 (S.D. N.Y. 1995) (holding that “limited, general and cursory discussions” of documents during a White House press conference did not constitute a waiver); *Public Citizen v. Department of State*, 787 F. Supp. 12, 14 (D.D.C. 1992), *aff’d*, 11 F.3d 198 (D.C. Cir. 1993)); *Peck v. United States*, 514 F. Supp. 210, 213 (S.D. N.Y. 1981) (limiting waiver to those sections of a report that had already been released in part).

⁷ *See also Pub. Citizen v. Dep’t of State*, 276 F.3d 634, 645 (D.C. Cir. 2002); *Afshar v. Department of State*, 702 F.2d 1125, 1132 (D.C. Cir. 1983); *Deglance v. DEA*, No. 05-2276, 2007 WL 521896, at *2 (D.D.C. Feb. 15, 2007) (finding no waiver when plaintiff produced circumstantial evidence that records have entered the public domain, but not the records themselves); *United States Student Ass’n v. CIA*, 620 F. Supp. 565, 571 (D.D.C. 1985) (establishing a legal standard for waiver of further confidential treatment of an exempt document that requires that the requester demonstrate “that the withheld information has already been specifically revealed to the public and that it appears to duplicate that being withheld.”).

In light of this, there is no basis for the Department to conclude that any record in the public domain duplicates that being withheld by the NPS in this case. Thus, you have not met your burden of establishing that a waiver occurred.

As to your allegation that the NPS allowed Mr. Farabee to review the case file, the NPS has advised the Department that this did not occur. Additionally, after speaking with Mr. Farabee, the NPS reports that the few paragraphs in his book regarding the incident derived from the personal knowledge he gained about the incident when he participated in the search activities. The Department has no reason to question the NPS on its statements on this issue.

Accordingly, for all of the above reasons, the Department concludes that the NPS properly invoked exemption (7)(A) to withhold the documents at issue in the appeal and you have not established that it has waived its ability to do so. Therefore, your appeal is denied.

This completes the Department's response to your appeal. If you are dissatisfied with this decision, you have a right to seek judicial review under 5 U.S.C. § 552(a)(4)(B).

If you have any questions regarding your appeal, please call me at (202)208-5339.

Sincerely,



Darrell R. Strayhorn
FOIA Appeals Officer
Department of the Interior

cc: Charis Wilson, FOIA Officer, NPS
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