

January 17, 2018

FOIA/PA Appeals Unit
DHS/Inspector General
STOP 0305
245 Murray Lane, SW
Washington, DC 20528-0305

Subject: Freedom of Information Act Appeal (#2018-IGFO-00033)

To whom it may concern:

This letter appeals the December 28, 2018, denial of the FOIA request submitted by Open the Government and the Project On Government Oversight on December 1, 2018, seeking the full 87-page report on the implementation of Executive Order 13769.¹

The Department of Homeland Security Office of the Inspector General's (DHS OIG) final response indicates that the entire report is being withheld as the records "pertain to a matter that is ongoing" and thus falls under the (b)(5) deliberative process privilege exemption. While other exemptions may also apply to segregable portions of the report, DHS OIG has asserted that they remain irrelevant "since this matter is still pending."

However, the requested report was completed over three months ago. It is no longer a draft report or a pre-decisional document. As written by Inspector General John Roth in his November 20, 2017, letter to Senators Durbin, Duckworth, and McCaskill, the "final 87-page report" was delivered to DHS leadership on October 6, 2017.² In his letter, IG Roth states that, "Because our report is final, we are able to tell you our high-level conclusions regarding our review."³ The IG himself has shared the report's conclusions with Congress as well as the public, and yet the OIG's FOIA office has deemed these same conclusions to be unreleaseable and unsegregable.

Being a final report, it is inherently post-decisional and therefore cannot be considered either pre-decisional or deliberative, no matter how many ongoing matters it may become a part of after

¹ The DHS OIG's final response and the original FOIA request are attached as enclosures A and B, respectively.

² DHS OIG, "DHS OIG Completes Its Review of Implementation of the Travel Ban; Awaits Decision by DHS Regarding Whether It Will Invoke Privilege," November 21, 2017, p. 2. <https://www.oig.dhs.gov/sites/default/files/assets/pr/2017/oigpr-112117-dhs-oig-completes-review-implementation-travel-ban.pdf> (Hereinafter November 20, 2017 DHS OIG Letter to Congress)

³ Ibid, p. 3

completion. As stated in *American Small Business League v. US Small Business Administration*, No. 3:04-cv-04250-SI (N.D. Cal. Apr. 29, 2005), “the argument that an agency will use a report in later policymaking ‘proves far too much.’ Any memorandum will be ‘predecisional’ if referenced to a decision that possibly may be made at some undisclosed time in the future.” It continues, stating that “a document is not considered ‘predecisional’ if it is only part of ‘a continuing process of agency self-examination.’”

Regardless of whether, as suggested in the November letter from Mr. Roth, the DHS is still “reviewing” the report for material covered by attorney-client privilege and threatening to invoke the deliberative process privilege, our FOIA request should still have been processed in the usual manner and referred to the relevant DHS components for expedited review of all information responsive to our request.⁴ It is surprising that the OIG has apparently decided to permit the DHS’s potentially unprecedented actions to block the OIG’s publication of this report. Inspector General Roth was “particularly troubled” by the DHS’s threat of invoking the deliberative process privilege, as it would prevent the OIG from being able to fulfill its obligations under the IG Act. The FOIA does not permit the withholding of embarrassing information that agencies would rather not publish, and courts have consistently ruled that the FOIA exemptions grow narrower when there is significant public interest in disclosure. The courts have also made clear that when the records pertain to government misconduct, there is a strong and inherent public interest, and those records should be released to the public.

However, the OIG’s final response to our FOIA request does not indicate that the DHS itself has invoked any such privilege. Rather, it simply states that “Because you requested a document involving an ongoing DHS-OIG matter, the document is withheld in full pursuant to the deliberative process privilege of Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5).”

As stated in the Department of Justice’s (DOJ) FOIA guidelines, the general purpose of the deliberative process privilege is to “prevent injury to the quality of agency decisions.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). This is based upon three policy purposes: “(1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) To protect against premature disclosure of proposed policies before they are actually adopted; and (3) To protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action.”⁵

Specifically, the courts have established two requirements for the invocation of the deliberative process privilege.⁶

First, the communication must be “predecisional, i.e., ‘antecedent to the adoption of an agency policy.’ Second, the communication must be deliberative, i.e., ‘a direct part of

⁴ The DHS OIG has also started processing and releasing records related to the implementation of Executive Order 13769 in other FOIA cases and, has not asserted the deliberative process privilege to withhold information responsive to these requests. *see* Letter from the Department of Homeland Security, Office of the Inspector General, response to Apr. 3, 2017 FOIA request, Jan. 5, 2018 (enclosed).

⁵ Department of Justice Guide to the Freedom of Information Act, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5_1.pdf; p. 366.

⁶ *Ibid*, p. 368.

the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Jordan v. DOJ*, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc); *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

The report in question fails every single one of the deliberative process requirements. It is not pre-decisional. It is not deliberative in nature. Its release, when appropriately redacted, will not diminish in any way the frank discussion of policy matters between subordinates and superiors. Its release will not protect against premature disclosure of proposed policies prior to adoption. Finally, its release will not result in public confusion due to the disclosure of rationales that were not in fact the ultimate grounds for agency action. The DHS OIG has not alleged otherwise. Instead, the OIG relies upon the vague statement of an “ongoing matter.”

Under the reforms codified in the FOIA Improvement Act of 2016, “(8)(A) An agency shall (i) withhold information under this section only if (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b).”⁷ In the recent case of *Ecological Rights Foundation v. Federal Emergency Management Agency*, 16-cv-05254-MEJ (N.D. Cal. 2017) the court determined:

Absent a showing of foreseeable harm to an interest protected by the deliberative process exemption, the documents must be disclosed. In failing to provide basic information about the deliberative process at issue and the role played by each specific document, FEMA does not meet its burden of supporting its withholdings with detailed information pursuant to the deliberative process privilege.⁸

As the DHS OIG has made no attempt to provide even basic information about the supposed harm that releasing this document would cause to an interest protected by either the deliberative process exemption or any other FOIA exemptions, it has clearly failed to meet its statutorily required burden of supporting its withholdings.

Furthermore, in the words of Inspector General Roth:

...invoking the privilege can mask discovery of decisions made based on illegitimate considerations, or evidence of outright misconduct. For that reason, in civil litigation the privilege is not absolute but requires a court to balance the competing interests of the parties. This has been interpreted to mean that a party requesting the information may overcome the privilege by showing a “sufficient need for the material in the context of the facts or the nature of the case . . . or by making a prima facie showing of misconduct.” *Redland Soccer Club Inc., v. Dep’t of Army of U.S.*, 55 F.3d 827, 854 (3d Cir. 1995).⁹

He continues:

⁷ Public Law No: 114-185; <https://www.congress.gov/114/plaws/publ185/PLAW-114publ185.pdf>; p. 539.

⁸ *Ecological Rights Foundation v. Federal Emergency Management Agency*, 16-cv-05254-MEJ (N.D. Cal. 2017); <https://www.leagle.com/decision/infdco20171201880>

⁹ November 20, 2017 DHS OIG Letter to Congress, p. 3.

With regard to this specific report, it would deprive Congress and the public of significant insights into the operation of the Department. Moreover, because we have concluded that CBP appears to have violated at least two separate court orders, we will be unable to describe the factual basis behind our conclusion.¹⁰

On its face, this report is a final, post-decisional record that is explicitly described by its author as providing not only “significant insights into the operation of the Department,” but also evidence of at least two instances of agency misconduct. Any attempt to withhold it under the guise of an “ongoing matter” without describing any foreseeable harm is a violation of the FOIA statute and blatantly inappropriate. We question why this privilege was invoked in this particular case, particularly given the high public interest in the issues associated with this IG investigation. The simplest explanation available for this behavior is that it constitutes an attempt to conceal government misconduct from the public.

The government therefore does not meet the requirements necessary in order to assert Exemption (b)(5) and withhold the requested record in its entirety. We ask that you again review the requested report in response to our requests, and process the document for disclosure in an expeditious manner, in accordance with your obligations under the FOIA.

If you find that this appeal is unclear in any way please do not hesitate to call me at (202) 332-6736 to see if I can clarify the request or otherwise expedite and simplify your efforts. You may also contact Daniel Van Schooten at dvanschooten@pogo.org or 202-347-1122.

Thank you for your consideration.

Sincerely,

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¹⁰ Ibid, p. 4