



OFFICE OF THE PRESIDENT

November 18, 2013

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The Clinic – Nonprofit Immigration Removal Defense  
515 Avenida Cesar E. Chavez  
Kansas City, MO 64108

**President**  
James J. Sandman

**RE: Appeal of FOIA Request No. 2013-26**

**Board of Directors**  
John G. Levi  
Chicago, IL  
*Chairman*

Dear Mr. and Ms. Sharma-Crawford and Ms. Alberti:

Martha Minow  
Cambridge, MA  
*Vice Chair*

I have received your Freedom of Information Act (FOIA) appeal, by which you challenge the Legal Services Corporation's (LSC) denial of your August 26, 2013 FOIA request.

Sharon L. Browne  
Sacramento, CA

I have reviewed LSC's response to your request and deny your appeal for the reasons explained below.

Robert J. Grey, Jr.  
Richmond, VA

**Background Facts**

Charles N. W. Keckler  
Arlington, VA

On August 26, 2013 (and on three prior occasions), you sent an email to LSC requesting records

Harry J. F. Korrell  
Seattle, WA

relating to the investigation, commencing on or about [ ]\* and ongoing until completion, of [an LSC grantee],\* and of the conduct of [an LSC-grantee staff attorney]\* in conjunction with [an alleged]\* violation of LSC regulations. To this end, we would ask for production of the report of findings by Investigative Counsel [ ]\* and/or any other Investigative Counsel/Officer. We are also requesting copies of any related materials, documents, statements, or transcripts obtained in conjunction with this investigation, as well as such materials that were relied upon by LSC personnel and/or LSC-OIG personnel in support of the findings made in this investigation.

Victor B. Maddox  
Louisville, KY

Laurie Mikva  
Evanston, IL

Fr. Pius Pietrzyk, OP  
Zanesville, OH

Julie A. Reiskin  
Denver, CO

Gloria Valencia-Weber  
Albuquerque, NM

On September 3, LSC's FOIA Officer responded to your request, informing you that LSC was denying the request pursuant to Exemption 7(A) of the FOIA, which protects from disclosure information compiled for law enforcement purposes that, if disclosed, could reasonably be expected to interfere with enforcement proceedings.

\* Given the sensitivity of the ongoing investigation and potential enforcement action, the dates, nature of the alleged violation, and the names of the grantee, staff attorney, and LSC Office of Inspector General investigative counsel involved have been redacted.

On October 21, LSC received your appeal challenging LSC's denial on the grounds that (1) LSC "has not provided any proof that there is still a basis for claiming the exemption under 5 U.S.C. § 552(b)(7)(A)," *i.e.*, that disclosure of the investigatory records sought could reasonably be expected to interfere with LSC enforcement proceedings; and (2) that LSC did not "define functional categories within which the requested records fall, conduct a document-by-document review in order to assign documents to the proper category, or explain *to the court* how the release of each category of materials would interfere with enforcement proceedings." (emphasis added). I address these arguments below.

### Analysis

The Freedom of Information Act, 5 U.S.C. § 552, made applicable to LSC by the LSC Act, 42 U.S.C. § 2996d(g), and implemented by LSC regulations at 45 C.F.R. § 1602 *et seq.*, "represents Congress' balance between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). "Therefore, although the FOIA strongly favors public disclosure of information in the possession of federal agencies,<sup>1</sup> the statute recognizes that public disclosure is not always in the public interest, and mandates that records need not be disclosed if they fall within one of the specific, enumerated exemptions set forth in the Act." *Center for Constitutional Rights v. Department of Defense*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 4864773 \*5 (S.D.N.Y. 2013) (internal citations and quotation marks omitted; footnote added).

When an agency denies a request in full or in part, the FOIA requires certain information to be provided to the requester, *DOJ Guidance on the Freedom of Information Act ("FOIA Guide")* at 67 (2009 ed.), including "the reasons [for the determination]," 5 U.S.C. § 552(a)(6)(A)(i); an "estimate of the volume" of any documents withheld, "unless providing such estimate would harm an interest protected by the exemption pursuant to which the denial is made," *id.* § 552(a)(6)(F); "the names and titles or positions of each person responsible for the denial of such request," *id.* § 552(a)(6)(C)(i); and "the right of such person to appeal to the head of the agency." *Id.* § 552(a)(6)(A)(i); *see also FOIA Guide* at 68.

The FOIA does not require initial denials to include specific proof that an exemption applies (in this case, proof that the release of requested investigatory records could reasonably be expected to interfere with LSC enforcement proceedings). A *Vaughn* index, *i.e.*, a categorization of responsive documents, a document-by-document review to assign documents to the proper category, and an explanation of how each category would interfere with enforcement proceedings, *see Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973), is also unnecessary; it is sufficient to reference the applicable exemption and provide a brief explanation of how it applies. 45 C.F.R § 1602.11(a)(1) and (2).

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<sup>1</sup> LSC is considered an "agency" for purposes of the FOIA. 42 U.S.C. § 2996d(g); *see also Regional Management Corp., Inc. v. Legal Services Corp.*, 186 F.3d 457 (4th Cir. 1999) ("The LSC Act provides that Legal Services shall not be considered a department, agency, or instrumentality of the Federal Government except as otherwise specifically provided in this subchapter. With the exception of the two subsections immediately following this provision, *id.* §§ 2996d(f) & (g), which relate to particular aspects of employee benefits and to the applicability of FOIA to Legal Services, respectively, there is no provision in the LSC Act that appears to specifically provide for considering Legal Services to be a federal agency.").

FOIA jurisprudence distinguishes an agency's obligations during the administrative process from those imposed during litigation. For example, in *Schwarz v. U.S. Dep't of Treasury*, 131 F. Supp. 2d 142 (D.D.C. 2000), the plaintiff-requester claimed that the defendant-agencies "responded generally to her [initial FOIA] requests and did not provide an affidavit containing a detailed list of the records searched, the documents withheld, and the reasons for withholding those documents." *Id.* at 146-47 (emphasis added). The court held that "[t]here is no requirement that an agency provide a 'search certificate' or a 'Vaughn Index' on an initial request for documents. *The requirement for detailed declarations and Vaughn indices is imposed in connection with a motion for summary judgment filed by a[n] [agency] in a civil action pending in court.*" *Id.* at 147 (emphasis added), citing *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984); *see also Crooker v. CIA*, No. 83-1426, 1984 U.S. Dist., LEXIS 23177 at \*3-4 (D.D.C. Sept. 28, 1984) ("Indeed, it is settled law that there is no requirement that administrative responses to FOIA requests contain the same documentation necessary in litigation."); *Natural Resources Def. Council v. Nuclear Reg. Comm'n*, 216 F.3d 1180, 1190 (D.C. Cir. 2000) (A Vaughn index "is a rule that governs litigation in court, not proceedings before the agency.").

Your reliance on *Durrani v. U.S. Dep't of Justice*, 607 F. Supp. 2d 77 (D.D.C. 2009), is misplaced.<sup>2</sup> That case was adjudicated on summary judgment where, consistent with well-established standards of review, *see* Fed. R. Civ. P. 56(c), the defendant-agencies bore the legal burden of establishing the applicability of FOIA exemptions. *See Durrani*, 697 F. Supp. 2d at 83-84 (setting forth the standard of review for a federal summary judgment motion); *see also Center for Constitutional Rights v. Dep't of Defense*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 4864773 \*5 (S.N.D.Y. 2013), citing *Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 190 (2d Cir. 2012) (explaining the respective evidentiary burdens of FOIA litigants during a summary judgment proceeding, which is the "preferred procedural vehicle for resolving FOIA disputes."). Agencies routinely meet that burden based "solely on information provided in *affidavits or declarations*" submitted to the court. *Durrani*, 697 F. Supp. 2d at 84 (emphasis added). In short, *Durrani* sets forth evidentiary standards applicable to a summary judgment proceeding, not the administrative review process.

In compliance with statutory and regulatory requirements, LSC's September 3 denial letter referenced FOIA Exemption 7(A) (*see* 45 C.F.R. § 1602.9(a)(6)(i)), the exemption upon which the denial was based, 45 C.F.R. § 1602.11(a)(1), and explained that the exemption was being asserted because the information requested related to "information compiled for law enforcement purposes, the release of which 'could reasonably be expected to interfere with enforcement proceedings.'" *Id.* § 1602.11(a)(2). A review of the all the responsive documents on appeal supports the conclusion that Exemption 7(A) was properly invoked and continues to be applicable. I can confirm that LSC's investigation and enforcement activities are ongoing.

Our review has also revealed that Exemption 7(C) (*i.e.*, 45 C.F.R. § 1602.9(a)(6)(iii)), which protects law enforcement information that, if disclosed, "could reasonably be expected to

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<sup>2</sup> *Manna v. Dep't of Justice*, 815 F. Supp. 798, 804 (D.N.J. 1993), is also inapplicable because it adjudicates an old version of Exemption 7(A) and was decided on evidentiary standards applicable to summary judgment proceedings, not the administrative process.

constitute an unwarranted invasion of personal privacy,” is applicable because of references to the staff attorney and other witnesses involved in the investigation.

It is impossible to segregate protected information within the responsive documents from any meaningful information that could be disclosed; our review found the two to be inextricably intertwined. *Id.* § 1602.11(a)(3); *see Fischer v. U.S. Dep’t of Justice*, 723 F. Supp. 2d 104, 115 (D.D.C. 2010) (An agency satisfies its segregability burden (in court) when it shows “both the highly sensitive nature of the exempt information and that non-exempt information is so intertwined with exempt information that the [agency] could not release any meaningful portion without disclosing exempt information.”). Thus, it is proper to continue withholding the records in their entirety.

Finally, I find that providing an estimate of the volume of documents withheld would harm the interests protected by Exemptions 7(A) (*i.e.*, LSC’s ability to conduct efficient and effective enforcement proceedings of an alleged violation of the LSC Act, rules, or regulations) and 7(C) (*i.e.*, the personal privacy of the staff attorney and witnesses) and, therefore, decline to provide such an estimate.

If you believe that my decision is in error, you may seek judicial review in a district court of the United States as provided in 5 U.S.C. § 552(a)(4).

Sincerely yours,



James J. Sandman  
President