

Date: April 18, 2008

To: Chief Counsels and FOIA Officers

From: Rosalind A. Knapp, Deputy General Counsel and Chief FOIA Officer

Subject: Responding to FOIA Requests for FOIA Case Logs

The purpose of this memorandum is to resolve a discrepancy that exists between a DOT decision on the Michael Ravnitzky FOIA appeal (FOIA File Nos. FY2002-230 and 2006-244) and U.S. Department of Justice (DOJ) guidelines, affecting the processing of FOIA requests that seek copies of FOIA case logs. Such requests are received on a recurring basis, and FOIA Officers and FOIA Attorneys within the Department have questioned whether they should adhere to the reasoning reflected in the Ravnitzky decision, or follow DOJ guidelines, when processing the requests. We have therefore further reviewed the issue and resolved it in favor of the DOJ position.

As background, as you know, each FOIA office uses a case log to track FOIA requests. The logs typically include the dates on which requests were received and closed, control numbers, requester names and descriptions of the requested records. Requests for the FOIA case log typically seek release of both the "requester name" field and the "records description" field, in addition to other parts of the log. From the requester names and/or records descriptions shown on a log, it is possible to discern which of the requests are by *first-party requesters* (persons seeking records about themselves), and which requests are by *third-party requesters* (persons or entities seeking records about others). FOIA Exemption 6 permits the government to withhold information about an individual that is contained in "personnel and medical files and similar files" from a FOIA requester, when disclosure would constitute a clearly unwarranted invasion of personal privacy.¹

The DOJ guidelines consider the privacy interests of third-party requesters listed on a FOIA case log to be so minimal as to permit third-party requester names to be released in combination with descriptions of the records they requested, without employing the balancing test² usually required under FOIA Exemption 6, in all but extraordinarily rare and compelling situations.³ The Ravnitzky decision treated the privacy interests of first-party and third-party FOIA requesters alike, and upheld the withholding of all individual requester names on the basis that the records descriptions had been released.

We are persuaded that the DOJ guidelines on this issue are correct in treating first-party and third-party requester information differently, for the reason stated in the guidelines, that "FOIA requester, except when they are making first-party requests, do not ordinarily expect that their names will be kept private."⁴ FOIA regards third-party requests as seeking documents for release to the public, and therefore regards third-party requesters' identities and interests as irrelevant for most purposes.⁵ Another difference between them is that third-party requesters have the option of making their requests anonymously, through surrogates or nominees, and first-party requesters do not have that option.⁶ The DOJ guidelines are reasonable in recognizing that there is a difference in the level of privacy interest inherent in first-party and third-party requester information, in most cases, yet the guidelines are flexible in permitting third-party requester information to be protected in "an extraordinarily rare and compelling situation."⁷

Also, if the reasoning in Ravnitzky were followed in responding to similar requests for the FOIA case log, additional appeals could be filed, like Mr. Ravnitzky's appeal, challenging the legality of the Department's withholding of information considered releasable by DOJ and other Federal agencies. Additional appeals on this issue would increase the workload of FOIA officers and attorneys in the Department, and could also increase the Department's exposure to liability for attorney fees.⁸

For these reasons, I have decided that the approach taken in the Ravnitzky decision should no longer be followed, and that DOT should instead conform to the DOJ guidelines on this issue. Accordingly, Departmental policy is that, *in general*, both fields (requester name and records description)⁹ are properly releasable with respect to third-party requests on the FOIA case log.

Should you have any questions, please contact Departmental FOIA Attorney Beth Kramer at (202) 366-0365.

1. 5 U.S.C. § 552 (b)(6). Log information pertaining to a first-party requester is, of course, releasable to that requester because such disclosure does not constitute an invasion of privacy.

2. See *National Association of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert denied*,

494 U.S. 1078 (1990) (“[W]e must first determine whether [the] disclosure would compromise a substantial, as opposed to a de minimis, privacy interest.” “If...a substantial privacy interest is at stake then we must weigh that privacy interest in non-disclosure against the public interest in the release of the records...”).

3. FOIA Guide, May 2004 Edition, at 437; FOIA Guide, March 2007 Edition, at 559; FOIA Update, Vol. VI, No. 1 (“FOIA Counselor Q&A”).

4. *Id.*

5. See FOIA Guide, March 2007 Edition, at 65-69.

6. See FOIA Update, Vol. VII, No. 1, at 1 (“Surrogate FOIA Requests Increasing”).

7. FOIA Update, Vol. VI, No. 1 (“FOIA Counselor Q&A”).

8. Under 5 U.S.C. § 552(a)(4)(E), attorney fees and other litigation costs are awardable at the litigation stage, if the requester has “substantially prevailed.” Effective December 31, 2007, § 552(a)(4)(E) was amended by the OPEN Government Act of 2007 to define “substantially prevailed” to include obtaining relief through either “a judicial order, or an enforceable written agreement or consent decree” or “a voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial.”

9. Certain information *within* those fields (e.g., home addresses and home telephone numbers) may, of course, be subject to exemption and redaction.