

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
JANE DOE¹) FOIA Control No. 2007-194
)
On Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 2008

Released: September 30, 2008

By the Commission:

1. The Commission has before it an Application for Review (AFR) filed by Jane Doe of the decision of the Office of the Inspector General (OIG) denying her Freedom of Information Act (FOIA)² and Privacy Act³ request for a copy of the report of an OIG investigation. For the reasons described below, we deny the application for review.

2. Ms. Doe filed a FOIA request seeking the final report of an OIG investigation.⁴ OIG withheld the report under the deliberative process privilege of FOIA Exemption 5.⁵ OIG also withheld the report pursuant to FOIA Exemption 7(A)⁶ because “release of the report could reasonably be expected to interfere with the investigation.”⁷ OIG also considered Ms. Doe’s request for the report as a request for access to records concerning herself under the Privacy Act⁸ because the report is part of a system of records.⁹ However, it concluded that the report was exempt from disclosure to her under the Privacy Act exemptions covering certain investigative material compiled for law enforcement purposes

¹ We use the pseudonym “Jane Doe” in our decision to protect the requester’s privacy. See 5 U.S.C. §§ 552(b)(6) and (b)(7)(C).

² 5 U.S.C. § 552.

³ 5 U.S.C. § 552a.

⁴ See Letter from Jane Doe to FOIA Officer (Feb. 28, 2007) (FOIA Request).

⁵ Letter from Jon Stover, Deputy Inspector General, to Jane Doe (Apr. 9, 2007) (Decision), at 1, citing 5 U.S.C. § 552(b)(5).

⁶ 5 U.S.C. § 552(b)(7)(A).

⁷ Decision at 1-2 (citing *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996) (“The records could reveal much about the focus and scope of the Commission’s investigation, and are thus precisely the sort of information exemption 7(A) allows an agency to keep secret.”); *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 312-13 (D.C. Cir. 1988) (release of documents would reveal scope and direction of the investigation)).

⁸ 5 U.S.C. § 552a.

⁹ See Decision at 2 (citing FCC/OIG-1 [sic; correct reference is FCC/OIG-2], *General Investigative Files*, 71 Fed. Reg. 17234, 17246-47 (2006)).

and for the purpose of determining suitability for Federal employment.¹⁰ Ms. Doe filed an AFR of the OIG's decision.¹¹

3. We find no reason to disturb OIG's decision. Ms. Doe does not question OIG's determination that the report is properly withheld under FOIA Exemptions 5 and 7(A).¹² Rather, she asserts that OIG erred by not releasing segregable portions of the report.¹³ However, after a review of the report, we conclude that there are no segregable factual portions that may be released. Agencies may withhold the entire record where any nonexempt material is so "inextricably intertwined"¹⁴ that disclosure would "leave only essentially meaningless words and phrases."¹⁵ Moreover, we conclude that the release of any factual summaries contained in the report would represent an unwarranted intrusion into the deliberative process because it would tend to reveal thinking as to the importance or unimportance of certain facts.¹⁶

¹⁰ See Decision at 2 (*citing* 5 U.S.C. § 552a(k)(2) and (k)(5) and 47 C.F.R. § 0.561(g) (FCC implementing rule)).

¹¹ Letter from Jane Doe to Laurence Schecker, Office of General Counsel (May 4, 2007) (AFR).

¹² We note that Exemption 7(A), cited by OIG, no longer applies because the matter is no longer under investigation. Exemption 5, however, continues to apply because the report contains deliberative process material concerning Ms. Doe's case. *See, e.g., Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (Exemption 5 is applicable to a document that is part of the course of the deliberative process); *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977) (Congress adopted Exemption 5 because "the quality of administrative decision-making would be seriously undermined if agencies were forced to 'operate in a fishbowl' because the full and frank exchange of ideas would be impossible."). Exemption 5 remains applicable to predecisional deliberative documents even after the decision has been made. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-52 (1978).

¹³ *See* AFR at 1.

¹⁴ *See Mead Data Central*, 566 F.2d at 267; *Soucie v. David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971).

¹⁵ *See, e.g., Neufeld v. IRS*, 646 F.2d 661, 663 (D.C. Cir. 1981) (internal quotation marks omitted).

¹⁶ *See Mapother v. Dep't of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993) (in upholding decision to withhold Department of Justice records relating to decision to exclude a foreign leader from the United States, the court stated: "Given the need for deliberation to inform discretion and for confidentiality to protect deliberation, we have felt bound to shelter factual summaries that were written to assist the making of a discretionary decision"); *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68-71 (D.C. Cir. 1974) (upholding decision to withhold summaries of evidence developed at a hearing when summaries were prepared for EPA Administrator's use in making decision on regulation of a pesticide).

4. The FOIA requester also contends that “Privacy Act exemption(s) cannot defeat the FOIA access.”¹⁷ While this proposition is correct,¹⁸ if a record is properly exempt from release under both the FOIA and the Privacy Act, it may properly be withheld from the requester.¹⁹ OIG correctly determined that the record may be withheld under FOIA Exemption 5 and the report is exempt from disclosure under the Privacy Act.²⁰ Therefore, Ms. Doe was properly denied access to the report.

5. Finally, while Ms. Doe does not seek review of the determination that the report is exempt from disclosure under Privacy Act sections 552a(k)(2) and (5), she quotes section 552a(e)(5), which requires that “each agency that maintains a system of records shall . . . maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.”²¹ That section does not, however, provide access for individuals to records about themselves.²² Individuals may generally obtain such access under section 552a(d)(1), and they may seek amendments or correction of the records under section 552a(d)(2). However, as the record at issue is part of a system of records that is exempt from section 552a(d),²³ Ms. Doe may not obtain access to the record under the Privacy Act.

6. The application for review by Jane Doe is DENIED. Ms. Doe may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B).

7. The following Commissioners are responsible for this decision: Chairman Martin and Commissioners Copps, Adelstein, Tate and McDowell.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁷ AFR at 1.

¹⁸ See 5 U.S.C. § 552a(t)(2).

¹⁹ See *Savada v. Dep’t of Defense*, 755 F. Supp. 6, 9 (D.D.C. 1991) (citing *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184 (D.C. Cir. 1987) and holding that to withhold the document agency must prove that the document is exempt from release under both FOIA and Privacy Act).

²⁰ Under the Privacy Act, 5 U.S.C. § 552a(k)(2), investigational material remains exempt from disclosure even after a matter is no longer pending. See *Irons v. Bell*, 596 F.2d 468, 471 (1st Cir. 1979) (unlike FOIA Exemption 7(A), there is no temporal limitation on the scope of subsection (k)(2) of the Privacy Act).

²¹ 5 U.S.C. § 552a(e)(5).

²² See *Doe v. FBI*, 936 F.2d 1346, 1350-51 (D.C. Cir. 1991) (explaining the regulatory framework and noting that the Privacy Act section 552a(e)(5) disclosure requirement is not absolute because the Privacy Act permits agencies to exempt certain systems of records from disclosure to parties named in the records); see also *Bassiouni v. FBI*, 436 F.3d 712, 721 (7th Cir. 2006) (noting district court’s unchallenged finding that section 552a(e)(5) “do[es] not . . . give rise to a cause of action”).

²³ FCC/OIG-2, *General Investigative Files*, 71 Fed. Reg. 17234, 17246 (2006) (“This system of records is exempt from sections (c)(3), (d), (e)(4)(G), (H), and (I), and (f) of the Privacy Act of 1974”); see also *Doe v. FBI*, 936 F.2d at 1351 (“The Act permits agencies to exempt certain systems of records from some of its requirements.”).