



Timothy C. Parlatore, Esq.
Founder & Managing Partner

FOIA APPEAL

September 23, 2020

Commandant (CG-6P)
ATTN: FOIA APPEALS
2703 Martin Luther King Ave, SE
STOP 7710
Washington DC 20593-7710

RE: Freedom of Information Act Appeal: Request # 2020-CGFO-01746

Dear Commandant:

This letter is submitted pursuant to 5 U.S.C. § 552(a)(6)(A) to appeal the U.S. Coast Guard's (USCG) final response to the Freedom of Information Act requests submitted by Ms. Hilary Mountgordon, assigned no. 2020-CFGO-01746. Ms. Mountgordon denies the USCG has met its obligations under the FOIA.

The USCG failed to conduct an adequate search for responsive records, failed to segregate records that should be released, and improperly withheld information and records pursuant to the FOIA Exemptions. For the reasons set forth below, the USCG's withholding of responsive records violates the FOIA. Ms. Mountgordon requests that all responsive records that are not exempt from disclosure be released to her within 20 days of receipt of this appeal.

I. FOIA Requests

a. First FOIA Request dated April 23, 2020

Ms. Mountgordon submitted a request under the Freedom of Information Act (FOIA) (5 U.S.C. 552 et. seq) dated April 23, 2020. Her request was received by the USCG on June 5, 2020¹ and assigned FOIA number 2020-CGFO-01746. Her request sought records relating to:

1. The final Investigation Report on Ms. Mountgordon's IG complaint filed on March 27, 2019;
2. [A]ny and all references relied up within the report; and

Exhibit
5

¹ Your final response letter incorrectly states her request was received on June 24, 2020. Ms. Mountgordon received an email on June 5, 2020 from the U.S. Coastguard FOIA/PA officing confirming receipt of her FOIA request. (Exhibit B).

3. Any supporting documentation which may have been used in creating the report. (Exhibit A).

Ms. Mountgordon's report involved injuries, bullying, and hazing at the Officer Candidate School during class 1-29 from July 2017 until November 2017, to herself (name in service: Hilary Veronica Gordon) as well as other Candidates. (Ex. A).

According to your final determination letter, on June 24, 2020, Ms. Mountgordon clarified her request to seek records relating to:

4. The Investigating Officer's Report relating to Ms. Mountgordon's complaint to the Department of Homeland Security Office of the Inspector General made on or about March 25, 2019;
5. Witness statements enclosed with the Investigator's Report described above; and
6. A list of all exhibits and enclosures appended to the Investigating Officer's Report described above.

On June 30, 2020 Ms. Mountgordon requested the USCG also provide:

7. The 2017 CGA Vital Signs Report attached to the Investigating Officer's Report as an exhibit. (Ex. D).

b. Second FOIA Request dated June 30, 2020

Ms. Mountgorden submitted a second FOIA request dated June 30, 2020 that sought records relating to:

8. The Final Action Memorandum issued on or about February 3, [2020] related to the IG investigation which Ms. Mountgordon initiated by a complaint filed March 27, 2019; and
9. A list of all references or enclosures mentioned within the Final Action Memorandum. (Exhibit C).

On July 1, 2020, Ms. Mountgordon agreed to consolidate her requests and consented to the USCG responding to both of her FOIA requests by July 15, 2020.

II. USCG failed to meet its obligation under the FOIA

The USCG sent Ms. Mountgordon a final determination letter dated July 15, 2020, stating it located 67 pages of responsive documents. Of the 67 pages, the USCG withheld 57 pages in full and produced 10 pages in part. (Exhibit D). The USCG also provided Ms. Mountgordon with a web address to access the requested records relating to the CGA Vital Signs Report (Item no. 5, above). However, the USCG failed to conduct an adequate

search for responsive records and failed to produce all responsive and non-exempt records.

a. The USCG failed to conduct an adequate search for records responsive to Ms. Mountgordon's FOIA Requests.

Once a requester submits a proper request for records, the FOIA requires the agency to conduct a "search" and make those records promptly available to the requester. 5 U.S.C. § 552(a)(3)(A). "Search" is defined under the FOIA to mean "review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request." 5 U.S.C. § 552(a)(3)(D).

The adequacy of an agency's search is based on a reasonableness test. *Bigwood v. United States DOD*, 132 F. Supp. 3d 124, 135 (D.D.C. 2015). The agency must conduct a search that is reasonably calculated to uncover all relevant documents. *Ethyl Corp. v. United States EPA*, 25 F.3d 1241, 1246 (4th Cir. 1994). The agency has the burden of demonstrating that its search was adequate. *See Bigwood*, 132 F. Supp. 3d at 135. Where an agency improperly limits its search to certain records systems, it has failed to conduct an adequate search. *Concepcion v. U.S. Customs & Border Prot.*, 767 F. Supp. 2d 141, 146 (D.D.C. 2011) (denying summary judgment for the agency because it did "not demonstrate that responsive documents would not reasonably be found in other record systems or that it searched any other potential sources but found no responsive records").

The USCG has not met its burden of establishing that its search was reasonably calculated to uncover all documents responsive to Ms. Mountgordon's FOIA requests. As a result, Ms. Mountgordon denies the USCG conducted an adequate search for agency records responsive to her FOIA requests.

b. The USCG Improperly Withheld Records Pursuant to FOIA Exemption 5

The USCG withheld information pursuant to FOIA Exemption 5 (5 U.S.C. § 552(b)(5)) in conjunction with the deliberative process privilege. To qualify, the documents must be "inter-agency or intra-agency" memorandums or letters and they must also be predecisional and deliberative. *Mapother v. Department of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 365-66 (4th Cir. 2009); 5 U.S.C. § 552(b)(5).

Ms. Mountgordon seeks the Investigating Officer's Report and other information related to her complaint to the Department of Homeland Security Office of Inspector General made on or about March 25, 2019. In response, you withheld 57 pages in their entirety and 10 pages in part. However, the USCG cannot withhold entire documents simply because it contains some exempt material. *Hornbeck Offshore Transportation, LLC v. U.S. Coast Guard*, Civil Action No. 04-1724 (CKK), at *31-32 (D.D.C. Mar. 20, 2006)(citing *Mead Data Cent., v. U.S. Dept. of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). The FOIA requires the USCG to provide Ms. Mountgordon with any reasonably

segregable information that is responsive to her requests. *Hornbeck Offshore Transportation, LLC.*, Civil Action No. 04-1724 at *31.

The deliberative process privilege protects only the “opinion” or “recommendatory” portion of a report, not factual information contained in a document. *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980); see e.g. *Mapother v. Department of Justice*, 3 F.3d 1533, 1539-40 (D.C. Cir. 1993) (where the court held that the portion of the report consisting of a chronology of the requester’s military career was not deliberative, as it was “neither more nor less than a comprehensive collection of the essential facts” and “reflects no point of view”). Additionally, even if a document is exempt from disclosure by the deliberative process privilege, the Supreme Court has ruled that the document may lose its protection of a final decisionmaker chooses expressly to adopt or incorporate it by reference. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975).

Accordingly, Ms. Mountgordon is entitled to the portions of the withheld records that are not exempt from disclosure pursuant to FOIA Exemption 5 in conjunction with the deliberative process privilege, or has lost its protection due to adoption and incorporation.

c. The USCG Improperly Withheld Information Pursuant to FOIA Exemption 6

The USCG improperly withheld information from the records it released pursuant to FOIA Exemption 6, (5 U.S.C. § 552(b)(6)). Exemption 6 permits an agency to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” 5 U.S.C. § 552(b)(6).

It appears the USCG withheld from the released records names and other information regarding the investigation. However, this is not the type of information Congress intended to protect under exemption 6. Exemption 6 is meant to protect personal information and not business-related information. *Fortson v. Harvey*, 407 F. Supp. 2d 13, 17-18 (D.D.C. 2005) (citing *Sims v. C.I.A.*, 642 F.2d 562, 574 (D.C. Cir. 1980); see also *Havemann v. Astrue*, Civil Action No. ELH-10-1498, at *11 (D. Md. Sep. 24, 2012) (citing *Department of State v. Washington Post Co.*, 456 U.S. 595, 600, 602 (1982) (indicating that “[i]nformation such as place of birth, date of birth, date of marriage, employment history, and comparable data” qualifies for consideration under Exemption 6)).

The withheld information that identifies government employees must be released because information that “merely identifies the names of government officials who authored documents and received documents” does not fall within Exemption 6.” *Aguirre v. S.E.C.*, 551 F. Supp. 2d 33, 53 (D.D.C. 2008); see e.g. *Casa De Maryland, Inc. v. United States Department of Homeland Security*, 409 F. App'x 697, 699 (4th Cir. 2011)(finding that exemption 6 did not protect names in a report and ordering the agency to disclose this information). Additionally, “[w]itness statements made during a discrimination

investigation are not the type of information that exemption 6 is designed to protect.” *Fortson*, 407 F. Supp. 2d at 17-18 (citing *Sims*, supra at 574).

You cite the information is withheld to protect privacy interest, but because the information withheld is not protected by exemption 6, a privacy analysis is not necessary. Furthermore, any privacy interest that exists is *de minimis*, the information therefore, must be disclosed. *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (holding if no significant privacy is implicated, the FOIA requires disclosure). Withholding information to prevent *speculative* harm is inappropriate. *Fortson*, 407 F. Supp. 2d at 17 (D.D.C. 2005). Personal embarrassment is not a sufficient reason to withhold information. *Id.* at 17-18 (citing *Sims*, supra at 574).

The information withheld from the records released is not exempt from disclosure pursuant to FOIA Exemption 6. Accordingly, this information must be produced to Ms. Mountgordon.

The basic purpose of the FOIA is to among other things, hold the governors accountable to the governed. *Casa De Maryland, Inc.*, 409 F. App'x at 699 (quoting *NLRB v. Robbins Tire Rubber Co.*, 437 U.S. 214, 242 (1978)). Failure to produce to Ms. Mountgordon the records she requested and is entitled to thwarts this purpose. Ms. Mountgordon requests that all responsive records that are not exempt from disclosure be released to her within 20 days of your receipt of this appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Timothy C. Parlatore', written in a cursive style.

Timothy C. Parlatore, Esq.



April 23, 2020

VIA E-mail

Commandant (CG-611)
ATTN FOIA Officer
U.S. Coast Guard Stop 7710
2703 Martin Luther King Jr Ave. S.E.
Washington D.C. 20593-7710

RE: Freedom of Information Act Request

Dear FOIA Officer,

This is a request under the Freedom of Information Act (FOIA).

I request that a copy of the following documents be provided to me: I am seeking the final Investigation Report on my IG complaint filed March 27, 2019. My complaint involved injuries, bullying, and hazing at the Officer Candidate School (OCS) during class 1-18 from July 2017 until November 2017, to myself (name in service: Hilary Veronica Gordon) as well as other Officer Candidates. I am requesting the report as well as any and all references relied up within the report, and any supporting documentation which may have been used in creating the report.

In order to help you determine my status for the applicability of any fees, I am requesting these documents for a personal, non-commercial use. Records may be sent in paper or electronic form.

If there are any fees for searching for or copying the documents, please let me know before you process my request. I am willing to pay fees for this request up to a maximum of \$25.00. If you estimate that the fees will exceed this limit, please contact me.

If you deny all or any part of this request, please cite each specific FOIA exemption that justifies your denial and notify me of appeal procedures available under the law. I also understand that some of my request may involve my records which are protected under the Privacy Act, however per 5 U.S.C. § 552a(t)(1) and (2) this FOIA request should include such records.

If you have any questions about processing this request, you may telephone me during at 708-979-1838.

Sincerely,

A handwritten signature in black ink, appearing to read "Hilary Mountgordon".

Hilary Mountgordon
1616 Regent Manor Ct.
Silver Spring, MD 20904
708-979-1838
Hilary.mountgordon@gmail.com



----- Forwarded message -----

From: <no-reply.foia.uscg@dhs.gov>

Date: Fri, Jun 5, 2020, 11:02 AM

Subject: RE: Your Freedom of Information Act (FOIA)/Privacy Act (PA) 2020-CGFO-01746

To: <hilary.gordon.esq@gmail.com>

Hilary Mountgordon,

This acknowledges receipt of your April 23, 2020, Freedom of Information Act (FOIA) request to the U.S. Coast Guard (USCG). Your request was received on June 05, 2020 and has been assigned FOIA[PA] number 2020-CGFO-01746.

We have queried the appropriate component of the USCG for responsive records. If any responsive records are located, they will be reviewed for determination of releasability. Please be assured that one of the processors in our office will respond to your request as expeditiously as possible. We appreciate your patience as we proceed with your request.

You may check the status of your request by entering FOIA[PA] request number 2020-CGFO-01746 into the following site: <http://www.dhs.gov/foia-status>. Request status is updated and refreshed on a nightly basis electronically.

You may contact this office via telephone at 202-475-3522 or via email at EFOIA@uscg.mil if you have any further

June 30, 2020

VIA E-mail to CDR Ben Karpinski



RE: Freedom of Information Act Request

Dear CDR Karpinski,

This is a request under the Freedom of Information Act (FOIA).

I request that a copy of the following documents be provided to me: I am seeking the Final Action Memorandum issued on or about February 3, 2020 related to the IG investigation which I initiated by complaint filed March 27, 2019. My complaint involved injuries, bullying, and hazing at the Officer Candidate School (OCS) during class 1-18 from July 2017 until November 2017, to myself (name in service: Hilary Veronica Gordon) as well as other Officer Candidates. I am requesting the memorandum. I request a list of all references or enclosures mentioned within the memorandum.

In order to help you determine my status for the applicability of any fees, I am requesting these documents for a personal, non-commercial use. Records may be sent in paper or electronic form.

If there are any fees for searching for or copying the documents, please let me know before you process my request. I am willing to pay fees for this request up to a maximum of \$25.00. If you estimate that the fees will exceed this limit, please contact me.

If you deny all or any part of this request, please cite each specific FOIA exemption that justifies your denial and notify me of appeal procedures available under the law. I also understand that some of my request may involve my records which are protected under the Privacy Act, however per 5 U.S.C. § 552a(t)(1) and (2) this FOIA request should include such records.

If you have any questions about processing this request, you may telephone me during at 708-979-1838.

Sincerely,

A handwritten signature in black ink, appearing to read "Hilary Mountgordon".

Hilary Mountgordon
1616 Regent Manor Ct.
Silver Spring, MD 20904
708-979-1838
Hilary.mountgordon@gmail.com

U.S. Department of
Homeland Security

United States
Coast Guard



Commanding Officer
United States Coast Guard
Legal Service Command

300 East Main Street, Suite 400
Norfolk, VA 23510
Staff Symbol: LSC-CO
Phone: (757) 628-4192

5720
FOIA #2020-CGFO-01746
July 15, 2020

Hilary Mountgordon
161 Regent Manor Ct.
Silver Spring, MD 20904



VIA EMAIL: Hilary.Mountgordon@gmail.com

Dear Ms. Mountgordon:

Please be informed this letter is the final response to your Freedom of Information Act (FOIA) requests to the U.S. Coast Guard (USCG), dated April 23 and June 30, 2020, as received by the Coast Guard Leadership Development Center (LDC) on June 24 and June 30, 2020, respectively.

Your April 23rd request to Commandant (CG-611) sought “the final Investigation Report on [your] IG complaint filed on March 27, 2019.”

On June 24, 2020, through telephonic discussion with the LDC, you clarified and amended your request to include the following records only:

1. The Investigating Officer’s Report relating to your complaint to the Department of Homeland Security Office of the Inspector General made on or about March 25, 2019, without exhibits or enclosures.
2. Witness statements enclosed with the Investigator’s Report described above.
3. A list of the Exhibits and Enclosures appended to the Investigating Officer’s Report described above.

On June 30, 2020, you requested that the following Investigating Officer’s Report exhibit also be provided in response to your original request:

4. 2017 “CGA Vital Signs Report.”

On June 30, 2020, you also submitted a request pursuant to the FOIA for:

5. “[T]he Final Action Memorandum issued on or about February 3, [2020] related to the IG investigation which [you] initiated by complaint filed March 27, 2019.”

On July 1, 2020, through telephonic conversation with the LDC, you agreed to LDC consolidating the above requests into a single response for delivery to you by July 15, 2020 and

to providing you a link to the “CGA Vital Signs Report” that is publicly available, but not a record within the control of Coast Guard Force Readiness Command or LDC.

Please be advised that a link to the CGA Vital Signs Report may be found at the following web address: <https://cue.usc.edu/files/2018/04/Vital-Signs-Report-FINAL-032818-V2.pdf>.

A search of LDC records for documents responsive to your request produced a total of 67 pages. After consulting with the Coast Guard Office of Information Management, I have determined that 57 pages of these records shall be withheld in their entirety and 10 pages of the records are partially releasable.

The 57 pages being withheld in their entirety, are withheld pursuant to 5 U.S.C. 552(b)(5) because they contain agency deliberations and preliminary findings that do not reflect the final agency decision in this matter. Disclosure of this material would discourage open and frank discussions in future deliberations and would cause public confusion resulting from disclosure of reasons that were not ultimately the grounds for the agency’s action.

The 10 pages that are released in part include withholdings pursuant to 5 U.S.C. 552(b)(5) and 5 U.S.C. 552(b)(6).

As noted in the enclosed records, the redacted portions of documents identified with the annotation “(b)(5)” are withheld pursuant to 5 U.S.C. 552(b)(5) because they contain agency deliberations and preliminary findings that do not reflect the final agency decision in this matter. Disclosure of this material would discourage open and frank discussions in future deliberations and would cause public confusion resulting from disclosure of reasons that were not ultimately the grounds for the agency’s action.

Additionally, redactions annotated with “(b)(6)” are withheld pursuant to 5 U.S.C. 552(b)(6) because there are clearly identifiable privacy interests in this information. I have determined that release of this material would likely cause particular harm to those privacy interests. I have considered the general public interest in releasing this information, but in each instance in which there is a redaction annotated with “(b)(6)”, the balance clearly tilts in favor of protecting the privacy interest of individuals rather than any general public interest in release.

The information within the enclosed documents being withheld pursuant to 5 U.S.C. 552(b)(6) includes handwritten documents, names of persons who are third parties or witnesses, names of junior Coast Guard personnel, and identifying role descriptions for persons whose names are withheld.

I am the person responsible for the denial of your request. Mr. Miguel Padilla and LCDR Anthony M. DeStefano, Coast Guard Legal Service Command, also participated in this decision. If you are not satisfied with the response to this request, you have the right to appeal. Should you wish to do so, you must send your appeal and a copy of this letter (within 90 days of the date of this letter) following the procedures outlined in the DHS regulations at 6 C.F.R. § 5.8., to:

Commandant (CG-6P)
ATTN: FOIA APPEALS

2703 Martin Luther King Ave., S.E.
STOP 7710
Washington DC, 20593-7710

Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Provisions of the FOIA allow the recovery of part of the cost of complying with your request. In this instance, because the cost is below the \$14 minimum, there is no charge. 6 CFR § 5.11(d)(4).

Should you need any further assistance or would like to discuss any aspect of your request, please contact Joseph Mason of my staff at Joseph.K.Mason@uscg.mil. You may also send an e-mail to efoia@uscg.mil or contact the Coast Guard's FOIA Public Liaison, Mrs. Amanda Ackerson, at 202-475-3522.

You have a right to right to seek dispute resolution services from the Office of Government Information Services (OGIS) which mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Contacting the FOIA Public Liaison or OGIS does not stop the 90-day appeal clock and is not a substitute for filing an administrative appeal. You may contact OGIS as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: 202-741-5770 or 1-877-684-6448

Sincerely,

R. E. BATSON, CAPT
Commanding Officer, Legal Service Command
U. S. Coast Guard

Enclosure: Responsive Documents (10 pages)

Copy: Coast Guard Leadership Development Center