



U.S. Customs and
Border Protection

DIS-3 OT:RR:DIS:FAPL
CBP-AP-2023-000184 JHS

July 26, 2023

Andrew Free
129289-34289926@requests.muckrock.com
MuckRock News
Dept MR129289 263
Huntington Ave
Boston, MA 02115

RE: Freedom of Information Act Appeal: CBP-AP-2023-000184/CBP-AP-2022-104662;
CBP-2022-087055; Emails Sent or Received Between May 24, 2022, and May 26, 2022,
by CBP's Office of Public Affairs, which contain at least one (1) of approximately 19
words requested.

Dear Mr. Free:

This letter is in response to your appeal dated July 14, 2022, in which you challenge the U.S. Customs and Border Protection (CBP), Freedom of Information Act (FOIA) Division's "Full Denial" response to your initial FOIA request for records. After review, the FOIA Division's "Full Denial" determination is Affirmed.

In your original FOIA submission dated June 3, 2022, you requested from CBP:

"To Whom It May Concern: Pursuant to the Freedom of Information Act, I hereby request the following records: All emails sent or received between May 24, 2022 and May 26, 2022, by persons working in or on behalf of CBP's Office of Public Affairs, including, but not limited to, Assistant Commissioner Luis Miranda, containing any of the following terms and their Boolean relators: (a) "Uvalde", (b) "BORTAC", (c) "kids", (d) "shooting", (e) "shooter", (f) "killing", (g) "[f*ck] up", (h) "[clusterf*ck]", (Please search the actual profane terms for (g) and (h), rather than the sanitized versions) (i) "delay!"; (j) "Hold w/5 position!"; (k) "en route"; (l) "tragedy"; (m) "massacre"; (n) "preventable"; (o) "prevented"; (p) Significant Incident Report; (q) professional responsibility; (r) "investigate"; and "responsib!". I respectfully request expedited

processing of this request and a fee waiver because of the widespread media attention and public interest related to these terms, and serious question as to the performance of critical government functions by this agency. Thank you, Andrew Free #DetentionKills Transparency Initiative Al Otro Lado The requested documents will be made available to the general public, and this request is not being made for commercial purposes. In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not. Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 20 business days, as the statute requires. Sincerely, Andrew Free Upload documents directly: https://accounts.muckrock.com/accounts/login/?next=https%3A%2F%2Fwww.muckrock.com%2Faccounts%2Flogin%2F%3Fnext%3D%252Faccounts%252Fagency_login%252Fbureau-of-customs-and-border-protection-38%252Fcbp-public-affairs-uvalde-emails-129289%252F%253F&url_auth_token=AAAj7BiSkmOS8SvcR5s3KkrTRvs%3A1nwypP%3AHmmg_X3oZGT03b6KNkkOFoDDoG5u_Jm2d5r4mxafxAY.”

On June 6, 2022, the CBP FOIA Division closed your request, and their final disposition was “Full Denial Based on Exemptions.”

On July 14, 2022, you submitted an appeal to this CBP FOIA Division determination. In your appeal, you stated,

“appeals blanket exemption 7A.”

Upon receipt of your appeal, an attorney on my staff conducted a *de novo* search for records, which included contacting the Office of Public Affairs (OPA) for a list of employees who may be involved in discussing the Uvalde school shooting incident and which would have records responsive to this appeal. Additionally, the attorney contacted the Office of Information Technology (OIT) for an email search of those OPA members provided for May 24, 2022 through May 26, 2022. This email search includes the approximately 19 words you provided in your initial request.

Based on the quantity of records located (approximately 1175), the attorney on my staff contacted you on September 7, 2022 asking if you would consider removing some search terms. On September 9, 2022, you responded saying that you would narrow your request and were interested in the emails that obtained the term “Uvalde” or “Robb” or something similar designating that it related to the school shooting. Based on this second search, we obtained around 1120 records, reducing the original quantity by roughly 55 records.

Upon receiving and reviewing the requested records, the attorney contacted and was informed by the Office of Professional Responsibility (OPR), Investigative Operations Division (IOD) that the Uvalde incident and information related to the Uvalde incident is still under investigation and review.

The Freedom of Information Act

Congress enacted FOIA in order “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation omitted). The statute provides that “each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules...shall make the records promptly available to any person.” 5 U.S.C. § 552(a)(3)(A).

The predominant objective of FOIA is the disclosure to the public of executive branch information that is maintained by the Federal Government unless the requested records contain certain categories of information that are exempt or excluded from compelled disclosure. FOIA provides nine exemptions and three exclusions pursuant to which an agency may withhold requested information. Thus, the public’s right to government information is not without limits. However, FOIA exemptions are to be narrowly construed, and the burden is on the government to demonstrate that the materials sought may be withheld due to one or more of the exemptions that are set forth in 5 U.S.C. §552(b).

Exemption (b)(7)(A)

Exemption (b)(7)(A) protects from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records, or information (A) could reasonably be expected to interfere with enforcement proceedings[.]” 5 U.S.C. § 552(b)(7)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110175, 121 Stat. 2524.

In originally enacting Exemption 7, Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their cases. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). The standard to prevail on an Exemption 7(A) claim is as follows: (1) the information withheld was compiled for law enforcement purposes, and (2) disclosure would produce one of the specified harms enumerated in the statute. *Davin v. United States DOJ*, 60 F.3d 1043, 1054 (3rd Cir. 1995).

In *Arizechi v. IRS*, the United States District Court for the District of New Jersey elaborated that:

“The term ‘law enforcement’ has been applied to enforcement through civil, criminal, or regulatory proceedings, and case law has interpreted ‘interference’ broadly. Courts have found that

Exemption 7A protects against disclosure of documents which would interfere with enforcement proceedings by revealing the identities of potential witnesses, the nature, scope, direction, and limits of the investigation, the transactions being investigated, information concerning third-party contacts, the evidence obtained to date, the reliance the agency places on the evidence, and the Government's strategies and theories.”

Arizechi v. IRS, 2008 U.S. Dist. LEXIS 13753, 15-16 (D.N.J. 2008). *See also, Curran v. U.S. Dep’t of Justice*, 813 F.2d 473, 474 n.1 (1st Cir. 1987); *Spannaus v. U.S. Dep’t of Justice*, 813 F.2d 1285, 1288 (4th Cir. 1987); *Barney v. IRS*, 618 F.2d 1268 (8th Cir. 1980); *Lewis v. IRS*, 823 F.2d 375, 379 (9th Cir. 1987) (holding that the government need only make a general showing that the disclosure of the records would interfere with the enforcement proceedings).

The purpose of the FOIA administrative appeal process is to review the administrative record to determine whether the agency properly addressed the requester’s initial request for records and accurately applied any applicable exemptions available under the FOIA. As such, it provides an agency with an opportunity to review the initial action taken in response to a FOIA request to determine whether corrective steps are necessary.

In connection with your appeal, as of the date of your request and subsequent appeal, the investigation into the Uvalde school shooting incident was and still is under investigation. Therefore, in its June 6, 2022, decision, the FOIA Division properly withheld the documents in full pursuant to Exemptions (b)(7)(A) of the FOIA (5 U.S.C. §§ 552(b)(7)(A)).

As stated above, upon receiving your appeal, we contacted OPA for a list of employees who may have been involved in discussing the Uvalde school shooting incident, and then contacted OIT for emails sent and received from these CBP employees, of which included any one (1) of the approximately 19 words you requested from May 24, 2022, through May 26, 2022. After receiving such records, we contacted OPR IOD, and it was determined that the investigation into the Uvalde incident has not yet concluded and releasing the records would likely interfere with CBP’s current and ongoing investigation into the Uvalde incident. As you are aware, there were many parties involved in the incident, and CBP is still collecting information about the incident, studying the response and determining the next best steps. Premature release of the emails would harm the government’s investigation because it would lead to deterring witness cooperation, affecting CBP’s ability to control or shape investigations, enabling targets to elude detection or change actions, facilitating the fabrication or suppression of evidence, and revealing evidence or strategy in ongoing investigations. Therefore, the June 6, 2022, Full Denial determination of the FOIA Division is hereby AFFIRMED.

In the event that you are dissatisfied with the disposition of your appeal, you may obtain judicial review of this decision pursuant to the provisions of 5 U.S.C. §552(a)(4)(B) in the United States District Court in the District in which you reside, in the District where the agency record is situated, or in the United States District Court for the District of Columbia.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

Sincerely,

Shari Suzuki

Shari Suzuki, Chief
FOIA Appeals and Policy
Regulations and Rulings
Office of Trade