



GSA Chief FOIA Officer

February 26, 2018

Ms. Maggie Christ
Campaign Legal Center
1411 K Street, NW
Suite 1400
Washington, DC 20005

Dear Ms. Christ:

This letter is in response to your U.S. General Services Administration (GSA) Freedom of Information Act (FOIA) appeal (GSA-2018-000742) dated February 7, 2018. Previously, on September 27, 2017, you submitted a FOIA request which was assigned No. GSA-2017-001699, in which you requested the following:

"All Senior Federal Travel Reports submitted to GSA in calendar year 2017."

GSA responded to you on October 9, 2017 and stated that per the Code of Federal Regulations (CFR) 41 § 301-70.906, agencies must report to GSA use of Government Aircraft to carry senior Federal officials and non-federal travelers. However, agencies maintain ownership of their travel data and determine how that data is made available to the public per CFR 41 § 301-70.908. Therefore, in order to obtain the travel information requested, you should submit your request directly to the agencies.

Herein below is the Agency's response to the arguments raised in your appeal:

- 1) "...[The FOIA] does not state that such agencies are the exclusive avenue for FOIA requesters to obtain travel records. More broadly, a GSA regulation clarifying that individual agency records are subject to FOIA does not absolve GSA of its own responsibilities under FOIA. Put another way, an Agency cannot by regulation exempt itself statutory mandate."

Agency response: GSA has not exempted itself from its responsibility under FOIA. It is nonetheless GSA's opinion that the records held here are that these records are undisputed that GSA obtained the records as required by law. However, as the court held in *Department of Justice vs. Tax Analysts*, 492 U.S. 136, 144-45 (1989), the threshold question of whatever the requested documents lies in determining whether or not said records were within the Agency's control at the time the FOIA request was made. It is GSA's position that the requested records were not.

- 2) GSA cannot deny that the requested records are "agency" records", nor does it claim that any exemptions apply.

Agency response: GSA does not concur with this assertion. The leading case on this matter is *Forsham v. Harris*, ___ U.S. ___ 48 U.S.LW. 4232 (1980), in which the Supreme Court held that

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records which had been generated by private grantees of the (then) Department of Health, Education and Welfare (HEW) working under a grant, and which had always remained in the grantees' possession, were not agency records despite the facts that HEW had a contract right to obtain copies of the records. The court here stated that "the agency must first create or obtain a record as a prerequisite to it become an agency within the meaning of the FOIA." Since HEW didn't exercise the option, the records remained those of the grantee.

The court's decision reflects concepts from the law of personal property, in which possession indicates ownership and control unless another person has a better claim to the property. Applied to the FOIA request here: it is GSA's determination that the agencies whom produced the records to GSA and are also required per CFR 41 § 301-70.908 to make the records available under the FOIA is who should respond to your FOIA request.

Moreover, with respect to your assertion that the requested information is not subject to FOIA's general exemptions, GSA disagrees. CFR 41 § 301-70.908 requires agencies to report information on non-federal employees, which is information that is likely to be withheld pursuant to Exemption 6 to the FOIA, 5 U.S.C. § 552(b)(6). However this is a determination to be made by the agency who furnished the information to GSA as required, and thus why it is GSA's determination that the agency furnishing the information is who should respond to your FOIA request.

- 3) The inconvenience to requesters outweigh any advantages to GSA form referring requests for Senior Federal Travel Reports to competent agencies: a referral would significantly impair requesters' ability to obtain such records and significantly increase the wait time to receive them.

Agency response: GSA does not concur with this assertion. 41 C.F.R. § 301-70.908 specifies that the agencies furnishing the requested records make said records available per the FOIA. Given the affirmative obligation of agencies to make the requested records available, GSA does not believe that the referral will result in a significant increase in the amount of time you must wait to obtain the requested documents. Moreover, GSA provided a reasonable explanation for its procedure in the previous response letter, whereby we explained that the requested records belonged to the originating agency.

This letter constitutes GSA's final determination regarding this matter. You have the right to seek judicial review of this determination in the United States District Court in the District in which you reside, have your principal place of business, or in the District of Columbia, or where the records are located. As an alternative to litigation, the Office of Government Information Services (OGIS) has been created under the 2007 FOIA amendments. OGIS was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a nonexclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at the Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, Room 2501, College Park, MD 20740, via e-mail at ogis@nara.gov or by phone at (877) 684-6448.

Sincerely,


Bob Stafford
Acting Chief FOIA Officer