

EXHIBIT G

November 2, 2018

Director, Office of Information Policy (OIP)
United States Department of Justice
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Re: FOIA Appeal (Request No. 145-FOI-16112 SBL:HDK)

Dear Sir or Madame:

We are writing to appeal the Department of Justice (“DOJ”) FOIA Office’s partial denial of Freedom of Information Act (“FOIA”) request No. 145-FOI-16112 SBL:HDK under Exemption 7(A). As discussed below, DOJ’s application of Exemption 7(A) to deny our FOIA request was inappropriate given the nature of the records that we requested, each of which have *already* been shared with the target of the investigation or litigation. We respectfully ask that you grant our appeal and direct the FOIA Office to release the records that we requested.

Background

On April 26, 2018, we submitted a FOIA request (the “*Swoben* Request”), which requested the following records:

1. All interrogatories, requests for production, deposition notices, requests for admission, or other discovery requests either received or served by the government in *United States ex rel. Swoben v. Scan Health Plan, et al.*, No. 09-5013 (C.D. Cal.) (“*Swoben*”);
2. All interrogatory answers, deposition testimony, declarations or other sworn statements either received by the government or provided by the government or witnesses on behalf of the government (including, without limitation, expert witnesses or Rule 30(b)(6) designees) in the *Swoben* matter;
3. All expert reports either received or served by the government in the *Swoben* matter;
4. All other documents that were produced to or by the government in the *Swoben* matter, including custodian references;
5. All pleadings, court rulings, and other docket entries in the *Swoben* matter; and

6. All communications with the defendant(s) or defense counsel regarding potential or actual settlement of the *Swoben* matter.

We submitted the *Swoben* Request online via the DOJ's website, and the request was assigned tracking number DOJ-2018-004484.

On the same date we also submitted a FOIA request (the "*Poehling* Request"), which requested the following records:

1. All interrogatories, requests for production, deposition notices, requests for admission, or other discovery requests either received or served by the government in *United States ex rel. Poehling v. United Health Group, Inc.*, No. 16-8697 (C.D. Cal.) ("*Poehling*");
2. All interrogatory answers, deposition testimony, declarations or other sworn statements either received by the government or provided by the government or witnesses on behalf of the government (including, without limitation, expert witnesses or Rule 30(b)(6) designees) in the *Poehling* matter;
3. All expert reports either received or served by the government in the *Poehling* matter;
4. All other documents that were produced to or by the government in the *Poehling* matter, including custodian references;
5. All pleadings, court rulings, and other docket entries in the *Poehling* matter; and
6. All communications with the defendant(s) or defense counsel regarding potential or actual settlement of the *Poehling* matter.

We submitted the *Poehling* Request online via the DOJ website, and it was assigned tracking number DOJ-2018-004485.

On the same day, we also submitted FOIA requests for the same categories of records regarding (1) *United States ex rel. Graves v. Plaza Medical Centers Corp.*, No. 10-23382 (S.D. Fla.), which was assigned tracking number DOJ-2018-004486 (the "*Graves* Request"), (2) *United States v. Janke*, No. 09-14044 (S.D. Fla.), which was assigned tracking number DOJ-2018-004487 (the "*Janke* Request"), and (3) *United Healthcare Ins. Co. v. Burwell*, No. 16-157 (D.D.C.), which was assigned tracking number DOJ-2018-004488 (the "*Burwell* Request").

On May 31, 2018, we received a letter from DOJ stating that the *Swoben* Request, the *Poehling* Request, the *Janke* Request, and the *Burwell* Request had been put on the complex track under request No. 145-FOI-16112 SBL:HDK. A copy of this letter is attached as Exhibit A. This letter did not state that the *Graves* Request had been included under this tracking number.

By letter dated September 17, 2018, DOJ informed us that it was denying the *Swoben* Request and the *Poehling* Request in their entireties under FOIA Exemption 7(A) (*i.e.*, 5 U.S.C. § 552(b)(7)(A)) because the records were "compiled for law enforcement purposes the release of

which could reasonably be expected to interfere with enforcement proceedings.” A copy of the September 17, 2018 letter is attached as Exhibit B. The letter further stated that DOJ was still processing the *Janke* Request and the *Burwell* Request, but that the *Janke* Request would cost approximately \$13,800 to process. The letter requested a five percent down payment on those costs, which we promptly paid.

Discussion

The FOIA Office’s decision to deny the *Swoben* Request and the *Poehling* request under FOIA Exemption 7(A) was inappropriate and inconsistent with the law. Under FOIA Exemption 7(A), agencies may withhold “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 522(b)(7)(A) (italics added).

According to the Department of Justice Guide to the FOIA (the “DOJ FOIA Guide”), “*Exemption 7(A) ordinarily will not afford protection when the target of the investigation has possession of or has submitted the information in question.*” FOIA Guide pg. 549 (italics added). This is true regardless of whether the FOIA requestor is the target of the investigation or a third party.

In support of this conclusion, the DOJ FOIA Guide cites, among other cases:

- *Lion Raisins v. USDA*, 354 F.3d 1072, 1085 (9th Cir. 2004) (overturned on other grounds), which holds that, where the target of a government investigation already has copies of the documents being sought via a FOIA request, FOIA Exemption 7(A) is inapplicable. This is because the government cannot credibly argue that the release of the documents “would allow [the target of the investigation] premature access to the evidence upon which [the government] intends to rely at trial.”
- *Wright v. OSHA*, 822 F.2d 642, 646 (7th Cir. 1987), which holds that Exemption 7(A) does not apply where the FOIA request would not provide the target of the investigation “with any information that it does not already have.”
- *Estate of Fortunato v. IRS*, No. 06-6011, 2007 WL 4838567, at *4 (D.N.J. Nov. 30, 2007), which holds that Exemption 7(A) is “[t]ypically . . . invoked where the release of documents may result in witness intimidation, have a chilling effect on potential witnesses and other sources of information, or undermine a witness’s confidentiality” and that the exemption is normally understood to be inapplicable to documents that are already in the possession of known or potential defendants.
- *Dow Jones Co. v. FERC*, 219 F.R.D. 167 (C.D. Cal. 2003), which holds that the disclosure of records to a third party (not subject to the investigation) could not be blocked under Exemption 7(A), where each of the companies that were targets of the investigation had already been provided a copy of the records and “therefor is on notice as to the government’s possible litigation strategy and potential witnesses.”

The FOIA Office erred in denying the *Swoben* Request and the *Poehling* Request because these requests only asked for materials that the government and the defendants in these cases have already exchanged during discovery. Accordingly, there is no risk that the production of these materials would reveal any secret information about the government's litigation strategy or raise any of the other traditional Exemption 7(A) concerns (*e.g.*, facilitation of witness intimidation, undermine witness confidentiality). All of the material has already been released to the targets of these investigations.

Conclusion

For the foregoing reasons, we respectfully ask that you grant our appeal and direct DOJ FOIA Office to provide the records that we requested.

Sincerely,

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