

On July 11, 2018, Appellant appealed OIG's determination to DOE's Office of Hearings and Appeals (OHA). In his appeal, Appellant alleged that there was no ongoing investigation into the Case and that the relevant DOE program office "is never going to investigate or respond to [OIG]." *Id.* Appellant asserted that Exemption 7(A) is not applicable if OIG is not actively "in the 'enforcement proceedings phase' of an 'on going investigation.'" *Id.*

On August 2, 2018, OIG provided OHA with an affidavit concerning Appellant's appeal and a description of the documents OIG had identified as responsive to Appellant's FOIA request. Affidavit of OIG Counsel (August 2, 2018). In the affidavit, the affiant declared that OIG's review of the Case is ongoing and that the affiant believed that disclosure of the responsive documents listed in the index would hinder OIG's investigation. *Id.* at 1–2.

II. Analysis

FOIA requires that documents held by federal agencies generally be released to the public upon request. The Act, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)–(9). Those nine exemptions are repeated in the DOE regulations implementing FOIA. 10 C.F.R. § 1004.10(b)(1)–(9). We must construe the FOIA exemptions narrowly to maintain FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001). The agency has the burden to show that withheld information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

A. Exemption 7(A)

The threshold requirement in any Exemption 7 inquiry is whether the documents were compiled for law enforcement purposes, *i.e.*, as part of - or in connection with - an agency law enforcement proceeding. *FBI v. Abramson*, 456 U.S. 615, 622 (1982); *Rural Housing Alliance v. USDA*, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); *Williams v. IRS*, 479 F.2d 317, 318 (3d Cir. 1973), *cert. denied sub nom. Donolon v. IRS*, 414 U.S. 1024 (1973). The documents at issue in this matter were categorically prepared for a law enforcement purpose; indeed, the only identifying characteristic the Appellant supplied concerning the records was that they pertained to the Case, an OIG investigation of alleged criminal conduct. Accordingly, the documents in this case meet the threshold requirement for withholding under Exemption 7.

However, in order to withhold information under Exemption 7, an organization must not only show that the documents were compiled for law enforcement purposes, but that it has statutory authority to enforce a violation of a law or regulation within its regulatory purview. *Church of Scientology v. Dep't of the Army*, 611 F.2d 738, 748 (9th Cir. 1979) (remanding to Naval Investigative Service to show that investigation involved enforcement of statute or regulation within its authority). OIG is statutorily charged with investigating waste, fraud, and abuse in programs and operations administered or financed by DOE. 5 U.S.C. App. §§ 2(2), 4. OIG is, therefore, a classic example of an organization with a law enforcement mandate.

Determining the applicability of Exemption 7(A) requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending and (2) whether release of information could reasonably be expected to cause some foreseeable harm to the pending enforcement proceeding.

See Miller v. USDA, 13 F.3d 260, 263 (8th Cir. 1993); *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986) (“government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding”). In applying these standards, courts have stated that agencies are not required to make a particularized, case-by-case showing of interference with their investigations. Rather, a generic determination of likely interference is sufficient. *See Murray, Jacobs & Abel*, 25 DOE ¶ 80,130 (1995) (Murray); *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224 (1978); *Crancer v. DOJ*, 999 F.2d 1302, 1306 (8th Cir. 1993). Even though an agency “need not justify its withholding on a document-by-document basis in court, [it] must itself review each document to determine the category in which it properly belongs.” *Bevis v. Dep’t of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986).

In this case, OIG insists that its investigation of the Case is ongoing. E-mail from OIG Counsel (July 16, 2018); Affidavit of OIG Counsel (August 2, 2018). An “enforcement proceeding” need not be presently pending, so long as it is likely to occur. *Ctr. for Nat’l Sec. Studies v. DOJ*, 331 F.3d 918, 926 (D.C.Cir.2003). While Appellant may take issue with the time required for OIG to perform its work, there is no basis to conclude at this time that OIG has abandoned its investigation or that an enforcement proceeding is unlikely to occur.

The responsive documents OIG identified relate specifically to the status of the ongoing investigation. Affidavit of OIG Counsel (August 2, 2018). Disclosing the status of an ongoing investigation, the material collected at the current stage, and OIG’s approach to investigating the Case is precisely the sort of information that, if disclosed, might put targets of investigation on notice and impair OIG’s ability to pursue its investigation. *See Judicial Watch, Inc. v. DOJ*, 306 F.Supp.2d 58, 75 (D.D.C. 2004). For these reasons, we find that a law enforcement proceeding is pending, and that the release of information could reasonably be expected to cause some foreseeable harm to that pending enforcement proceeding. Therefore, we find that the requested records were properly withheld, and Appellant’s appeal is denied.

III. Order

It is hereby ordered that the appeal filed by Anthony Garziona on July 11, 2018, No. FIA-18-0029, is denied.

This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) 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 the right to pursue litigation. OGIS may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS

College Park, MD 20740
Web: ogis.archives.gov Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals