

Legal Opinion: GMP-0022

Index: 7.370, 7.413
Subject: FOIA: Final Investigation Reports (Closed)

November 14, 1991

MEMORANDUM FOR: Leonora Guarraia, General Deputy
Assistant Secretary for Fair Housing
and Equal Opportunity

FROM: Carole W. Wilson
Associate General Counsel for Equal
Opportunity and Administrative Law

SUBJECT: Disclosure Under the Freedom of Information Act
(FOIA) of Final Investigation Reports in Closed Cases

You requested my opinion on whether the Department may withhold from the public Final Investigation Reports (FIR) in Fair Housing cases brought by the Department under the authority of the Fair Housing Act, 42 U.S.C. 3601-19.

Exemption 7(A) of the FOIA, 5 U.S.C. 552(b)(7)(A), can be invoked by the Department to withhold a FIR while the case is still open.¹ A case is considered open while enforcement proceedings are still pending. Under case law an enforcement proceeding is not deemed to have ended until all reasonably foreseeable administrative and judicial proceedings have concluded. *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214 (1978).

Once a case is no longer open, Exemption 7(A) is not applicable to withhold a FIR and it must be disclosed to the public upon request. This would be true with all determinations of no reasonable cause. On the other hand, certain portions of a FIR can continue to be withheld under other provisions of Exemption 7 even though the case is no longer open. This would include, for example, protection of information involving personal privacy under Exemption 7(C) and protection of information involving confidential sources under Exemption 7(D).

¹Exemption 7(A) exempts from mandatory 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. . ."

2

In certain circumstances, a FIR can still be protected, although enforcement proceedings have been concluded. For example, Exemption 7(A) can be invoked to protect a FIR where disclosure would interfere with a related, pending enforcement proceeding. *New England Medical Center Hospital v. NLRB*, 548

F.2d 377, 385-87 (1st Cir. 1976), reh'g denied, 548 F.2d 387 (1st Cir. 1977). The exemption may also be invoked when an investigation has terminated but an agency retains oversight or some other continuing enforcement-related responsibility. See *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, C.A. No. 83-1646 (D.D.C. April 30, 1984) (Exemption 7(A) remains applicable while motion to withdraw guilty plea still pending); *ABC Home Health Services, Inc. v. HHS*, 548 F. Supp. 555, (N.D. Ga. 1982) (final settlement subject to re-evaluation for at least three years).

Despite the above discussion concerning whether the FOIA requires disclosure of a FIR to members of the public upon request, since the FOIA exemptions are discretionary, the Department is not required to assert Exemption 7(A) in instances where an enforcement proceeding is open. In each individual case, it would be advisable for the Department to determine whether disclosure would interfere with enforcement proceedings.
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