

Legal Opinion: GMP-0089

Index: 7.360

Subject: FOIA Appeal: Names and Addresses on Complaints Re PFCRA

June 19, 1992

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Dear Mr. Haber:

This is in response to your April 16, 1992 Freedom of Information Act (FOIA) appeal. You appeal the March 18, 1992 denial by Anna-Marie Kilmade Gatons, Director, Executive Secretariat. Ms. Gatons withheld under Exemptions 6 and 7(C) the names and addresses on complaints mailed to potential defendants in Program Fraud Civil Remedies Act (PFCRA) matters. Ms. Gatons indicated that, pursuant to 24 C.F.R. 28.21, the names of potential defendants in PFCRA actions could not be released under the FOIA until complaints and answers were filed with the Office of Administrative Law Judges, thus making the information part of the public record. Premature release of this information would violate the individual's personal privacy under FOIA Exemptions 6 and 7(C). Moreover, release of the information in advance of a public record could subject the individuals involved to unfair inferences and intrusions. Therefore, I have determined to affirm the initial denial.

Exemption 6 of the FOIA protects information in medical and personnel files and "similar files" the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The Supreme Court in *Department of State v. Washington Post*, 456 U.S. 595 (1982), gave "similar files" a broad meaning under Exemption 6 to cover detailed Government records and files concerning an individual, when such files can be identified as applying to that individual. The Court made clear that any identifiable information which "applies to a particular individual," meets the threshold requirement for Exemption 6 protection. *Id.* at 602.

Any stated purpose for release of personal privacy information must also satisfy the new public interest determination of *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) (hereinafter "Reporters Committee"). Reporters Committee established a new framework for analyzing public interest determinations as applicable to Exemptions 6 and 7(C). Under Reporters Committee, the court held that only the furtherance of FOIA's core purpose of informing citizens about "what their Government is up to" can warrant the release of information containing individual privacy interests. Reporters Committee, 489 U.S. at 772-73.

In regard to your appeal, I have concluded that disclosure of the identities of potential defendants facing possible Agency administrative action for alleged violations of Federal law, and prior to the filing of a formal charge before an ALJ, would constitute a clearly unwarranted invasion of personal privacy. Moreover, the Government has a strong interest in assuring due process to potential defendants and precluding premature or unwarranted disclosures regarding an individual's alleged improper conduct or activities. *Stern v. FBI*, 737 F.2d 84, 91-92 (D.C. Cir. 1984); see also *Dunkelberger v. Department of Justice*, 906 F.2d 779, 781 (D.C. Cir. 1990).

While I can appreciate your interest in offering your legal services to potential defendants, your stated purpose to use the information in direct mail advertising is not a sufficient public purpose to outweigh the personal privacy exemption.¹ Courts have traditionally held no public benefit in the release of privacy information for commercial purposes. *Minnis v. U.S. Department of Agriculture*, 737 F.2d 784, 786 (9th Cir. 1984), cert. denied, 105 S. Ct. 2112 (1985); *HMG Marketing Associates v. Freeman*, 523 F. Supp. 11, 14 (S.D. N.Y. 1980). Therefore, I have determined to affirm the initial denial. I have also determined that, pursuant to 24 C.F.R. 15.21, the public interest in assuring the personal privacy of individuals militates against release of the withheld information.

¹*Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988), does not involve whether there is an overriding public interest in disclosure under the FOIA for the Government to release names of potential defendants for direct-mail advertising by lawyers for pecuniary gain. The Supreme Court, in *Shapero*, held that States could not, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting business for pecuniary gain by sending nondeceptive letters to potential clients known to face legal problems. The Constitutional protection for direct-mail legal advertising, however, does not provide a basis for requiring Government disclosure of the names of potential defendants for such mail solicitation.

Please be advised that you have the right to judicial review of this determination under 5 U.S.C. 552(a)(4).

Very sincerely yours,

C.H. Albright, Jr.
Principal Deputy General Counsel

cc: Yvette Magruder
Phillip Kesaris