

Legal Opinion: GMP-0145

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Subject: FOIA Exemption 7: Closed Cases--Final Reports

January 26, 1993

MEMORANDUM FOR: Andrew Cuomo

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

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

I am writing in response to your hypothetical question as to whether the Department may withhold from the public Final Investigation Reports (FIR) in closed criminal cases investigated by the Department.

Exemption 7(A) of the FOIA, 5 U.S.C. Section 552(b)(7)(A), can be invoked by the Department to withhold a FIR while the case is still open. Exemption 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. . ." 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. 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).

Exemption 7(C) has been regularly applied to withhold references to persons who were of "investigatory interest" to a criminal law enforcement agency. *Fund for Constitutional Government v. National Archives and Records Service*, 656 F.2d 856, 861-66 (D.C. Cir. 1981) (identities of those investigated but not charged must be withheld unless "exceptional interests militate in favor of disclosure"). Similarly, courts have found

protectible privacy interests--in conjunction with or in lieu of protection under Exemption 7(D)--in the identities of individuals who provide information to law enforcement agencies. Consequently, the names of witnesses, their home and business addresses, and their telephone numbers have been held properly

protectible under Exemption 7(C). *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990) (per curiam) (withholding interviewees' names as "necessary to avoid harassment and embarrassment"); *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 359 (3rd Cir. 1985) ("privacy interest of . . . witnesses who participated in OSHA's investigation outweighs public interest in disclosure").

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.

I hope this is helpful to you. Please do not hesitate to call on me if I can be of further assistance to you. I can be reached at (202) 708-2203.