

**U.S. OFFICE OF SPECIAL COUNSEL**  
1730 M Street, N.W., Suite 218  
Washington, D.C. 20036-4505  
202-254-3600

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December 22, 2015

Mr. Bruce & Mrs. Sara Schundler  
47 Four Oaks Road  
Bedminster, NY 07291  
**Via E-Mail at [bruce@schundler.net](mailto:bruce@schundler.net)**

RE: Freedom of Information Act Appeal (Ref. # FP-14-0182; AP-16-0003)

Dear Mr. and Ms. Schundler:

This responds to your Freedom of Information Act (FOIA), 5 U.S.C. § 552, appeal, dated November 4, 2015, and received by this office on November 4, 2015. You appealed from the decision of the Office of Special Counsel (OSC) described in FOIA Public Liaison Dawn R. Kral's October 20, 2015 letter to you.

I have reviewed your initial request, records processed for that response, and your appeal. After carefully considering your appeal, I am affirming OSC's response. OSC properly withheld records under the FOIA Exemptions discussed in Ms. Kral's response. My decision is as discussed below.

### **Your Appeal**

Your appeal raises issues relating to the withholding of information pursuant to FOIA Exemptions for investigatory material, 5 U.S.C. §552(a); for material normally privileged in civil litigation, §5 U.S.C. 552(b)(5); and for material which pertains to "law enforcement records whose disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy." §5 U.S.C. 552(b)(5).

### **FOIA Exemptions**

I affirm that Ms. Kral properly denied the entire request for information under the Privacy Act, 5 U.S.C. 5 U.S.C. §552(a) and properly reviewed your request under the FOIA. By regulation OSC deems complaint records such as you requested ("final draft

reports” and “the last actual ‘final report’” of investigations OSC conducted for case numbers MA-11-2436 and MA-11-3151) as exempt from public access.

Your appeal also challenges the two FOIA Exemptions on which Ms. Kral relied to withhold the sole responsive document. FOIA Exemption 5, 5 U.S.C. § 552(b)(5), permits agencies to protect from disclosure documents that are normally privileged in civil discovery (including the attorney work product, deliberative, and attorney client privileges). The attorney work product privilege protects from disclosure information prepared in reasonable anticipation of litigation. The deliberative process privilege protects from disclosure information the release of which would harm agency decision-making. The 13 page document withheld here was properly designated as attorney work product pursuant to FOIA Exemption 5, since the material was prepared in reasonable anticipation of litigation, and also properly withheld under the deliberative process privilege.

You complain that your PPP was not a “civil” action and that the document was generated in connection with a settlement. However, the attorney work product privilege extends to administrative proceedings. *See* U.S. Dep’t of Justice Guide to the Freedom of Information Act, 2009 ed., at 394; *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1187 (D.C.Cir 1987). The attorney work-product privilege also has been held to cover documents "relat[ing] to possible settlements" of litigation. <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5.pdf> at p.50. *Cities Serv. Co. v. FTC*, 627 F. Supp. 827, 832 (D.D.C. 1984) ("attorney's notes or working papers which relate to . . . possible settlement discussions . . . are protected under the attorney work-product privilege"), *aff'd*, 778 F.2d 889 (D.C. Cir. 1985) (unpublished table decision).

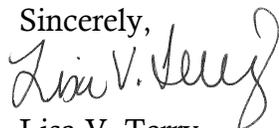
You also again challenge our designation of the withheld records as “law enforcement records” subject to the protections of FOIA Exemption 7. However, law enforcement records created or compiled for law enforcement purposes also include civil law enforcement matters. *See* U.S. Dep’t of Justice Guide to the Freedom of Information Act, 2009 ed., at 502. OSC is a civil law enforcement agency, and the records responsive to your request were created or compiled for law enforcement purposes within our jurisdiction. OSC also properly withheld, under FOIA Exemption 7(C), certain portions in order to avoid an unwarranted invasion of personal privacy.

If you disagree with OSC’s determination, you have two alternatives. The 2007 amendments to the FOIA 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 your right to pursue litigation.<sup>1</sup> You may also seek judicial review of this decision on your appeal by filing a complaint in an appropriate United States district court. *See* 5 U.S.C. § 552(a)(4)(B).

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<sup>1</sup> You may reach OGIS via email ([ogis@nara.gov](mailto:ogis@nara.gov)), telephone (202-741-5770 or 1-877-684-6448), fax (202-741-5769), or U.S. Postal Service at Office of Government Information Services, NARA, 8601 Adelphi Road-OGIS, College Park, MD 20740.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa V. Terry". The signature is fluid and cursive, with a large, stylized initial "L".

Lisa V. Terry

General Counsel

Office of Special Counsel

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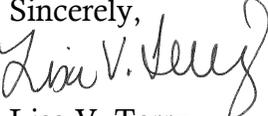
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