



Consumer Financial Protection Bureau
Attention: Chief FOIA Officer
Freedom of Information Appeal
1700 G Street, NW
Washington, DC 20552

June 7, 2013

**RE: FOIA Request Number CFPB-2013-116-F
Freedom of Information Appeal to
Consumer Financial Protection Bureau**

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
NATIONAL OFFICE
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Dear Chief FOIA Officer:

Pursuant to 12 C.F.R. § 1070.21, MFY Legal Services, Inc. (“MFY”) appeals the decision of the Consumer Financial Protection Bureau (“CFPB”) to withhold portions of certain records that it sought pursuant to the Freedom of Information Act (“FOIA”). For purposes of this administrative appeal, MFY is represented by the American Civil Liberties Union Foundation (“ACLU”).

I. BACKGROUND

MFY’s FOIA request seeks complaints filed with CFPB concerning mortgage products, loan modifications, collection, or foreclosure between December 1, 2011 and April 5, 2013, the date of its request for mortgage products located in New York State. *See* MFY FOIA Request, dated Apr. 5, 2013, attached as Ex. A. It also seeks information concerning CFPB’s response to these complaints. The request notes that identifying information about the homeowner, borrower, or complainant will be redacted. Additionally, MFY seeks a fee waiver, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

In a letter dated April 24, 2013, CFPB noted that there were 6,040 complaints responsive to MFY’s request. CFPB Response Letter, dated April 24, 2013, attached as Ex. B. Along with that letter, it produced a Microsoft Excel spreadsheet which contained a row of data for each of these complaints. As the letter explains, the columns that were included in that spreadsheet were themselves unredacted. However, CFPB declined to produce the complaint narratives, which contain the substance of each complaint.



CFPB claimed that the complaint narratives were withheld pursuant to the Privacy Act, 5 U.S.C. § 552, which prohibits disclosure of information about individuals where such information is subject to a FOIA exemption, and pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6). It asserted that complaint narratives often include names, account details, and other highly-sensitive information. It then stated that narratives may also contain personally-identifiable information that CFPB cannot discern as such. By way of example, it noted that a member of the public “who is familiar with a particular complainant or the details of a consumer’s story” might be able to identify that person from information in the narrative. CFPB Response Letter, at 2. Accordingly, it asserted that it would not release even portions of narratives “that are seemingly innocuous” until its study determined that it could “reliably and efficiently recognize and redact” all personally-identifiable information.

CFPB provided no records containing CFPB notes or follow-up on the requested complaints and made no reference to the existence of such records in its letter.

Finally, although CFPB produced the spreadsheet at no cost, it was silent as to whether it had granted a fee waiver. *Id.*

As set forth below, Exemption 6 is in no way applicable to the complaint narratives on a categorical basis. Accordingly, CFPB must produce the complaint narratives with names, account numbers, loan numbers, and other directly identifying information redacted.

II. THE COMPLAINT NARRATIVES ARE NOT CATEGORICALLY SUBJECT TO FOIA EXEMPTION 6.

CFPB’s rationale for completely withholding the complaint narratives, that it might be possible to use information from a narrative together with other information to identify a particular individual, is one that has been roundly rejected by the Supreme Court and Courts of Appeal in interpreting Exemption 6.

That provision exempts from disclosure under FOIA “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The Supreme Court has made clear that “Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 380 n. 19 (1976).

The Sixth Circuit has rejected an Exemption 6 argument nearly identical to the one proffered by CFPB here. The Federal Aviation Administration (FAA) claimed that withholding the names of air traffic controllers from requested disciplinary files was “inadequate to protect their identities, since information regarding the facility, region, representative, addresses, etc. can be pieced together into an identifiable set of circumstances.” *Norwood v. F.A.A.*, 993 F.2d 570, 574 (6th Cir. 1993). The FAA contended that it was “only possible to protect the identity of the [] controllers by withholding any and all information that [could] lead to identification thereof.” *Id.*

The Court denied this contention, finding that “such a view of protecting privacy-excluding from disclosure any and all fragments of information that might assist a diligent researcher in identifying a person-is not supportable.” *Id.* The Supreme Court, it noted, had “rejected nondisclosure based simply on the possibility that an item might trigger recollection of a person's identity[, since] [t]he exemption is directed at threats ‘more palpable’ than mere possibility of identification.” *Id.* (citing *Rose*, 425 U.S. at 380 n. 19). The Sixth Circuit also cited to a decision of the District of Columbia Circuit, which found that Exemption 6 did not bar disclosure of information that “has the ‘possibility’ of supplying a ‘missing link’ in the chain of identification.” *Id.* at 575 (quoting *Arieff v. Dep’t of Navy*, 712 F.2d 1462, 1467 (D.C. Cir. 1983)).

It is also worth noting that members of the public who submit the requested complaints are subject to CFPB’s posted privacy policy, which includes the following clear statement: “We may also share your complaint or inquiry (but not your personally identifiable information) with the public through a public complaint database.” CFPB Privacy Act Statement screenshot, accessed June 6, 2013, attached as Ex. C. *See also Ditlow v. Shultz*, 517 F.2d 166, 172 (D.C. Cir. 1975) (finding absence of agency assurance of confidentiality and assertion of authority to disclose information “would seem to undercut the privacy expectations protected by exemption 6”).

Further, any slight incursion on privacy here is warranted by the public interest in disclosure. *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (noting Exemption 6 requires balancing of “the public interest in disclosure against the interest Congress intended the exemption to protect”) (citation and internal marks omitted). Congress did not bar, as it might have, only disclosure that could be guaranteed not to “trigger recollection of identity in any person whatever.” *Rose*, 425 U.S. at 378 (1976). Instead, it limited “the exemption to cases of ‘clearly unwarranted’ invasions of personal privacy.” *Id.* at 378-79 (internal citations omitted).

Here, as detailed above, the infringement on personal privacy is one courts have found to be unpersuasive. In contrast, the public interest – how well CFPB is performing its statutory duties – is core to FOIA’s purpose. *U.S. Dep’t of State v. Ray*, 502 U.S. 164 (1991) (recognizing a public interest in knowing if the State Department was adequately monitoring compliance). Created by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, CFPB was delegated primary authority to enforce federal consumer protection laws and guarantee that consumers are protected from unfair, deceptive or abusive practices. The requested information – the complaint narratives and CFPB’s responses – will shed light on how effective CFPB has been in protecting consumers from abusive mortgage modification and foreclosure practices.

Finally, entire documents are not exempt from FOIA disclosure merely because certain portions of those documents may be exempt. *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). “Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Thus, CFPB is obligated to redact information that is directly personally identifiable (e.g., names and account information) and to disclose the redacted versions of the requested complaint narratives.

III. THE INSTANT FOIA REQUEST WARRANTS A FEE WAIVER.

Finally, while CFPB’s response does not address the fee waiver requested by MFY, the FOIA Request here clearly meets the statutory and regulatory requirements for fee waivers. *See* 5 U.S.C. § 552(a)(4)(A)(iii) (providing for fee waiver where disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester”).

MFY submits that it should be considered a representative of the news media for purposes of this request. *See* 12 C.F.R. § 1070.22(b)(1)(iv). It is a non-commercial entity “that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” *Id.* MFY is a non-profit legal services organization. Its interest in this material relates to its advocacy on behalf of persons who have experienced mortgage- and foreclosure-related difficulties. In the past, MFY has used public foreclosure-related data to issue in-depth analyses concerning foreclosure abuses (*see* *Justice Deceived: How Large Foreclosure Firms Subvert State Regulations Protecting Homeowners*, available at <http://www.mfy.org/wp->

content/uploads/MFY-White-Paper-JUSTICE-DECEIVED.pdf and Justice Unsettled: How the Foreclosure Shadow Docket & Discontinuances Prevent New Yorkers from Saving Their Homes, *available at* <http://www.mfy.org/wp-content/uploads/Justice-Unsettled-plus-APP.pdf>). Similarly, for the information requested here, MFY intends to use its expertise to process these materials into distinct work used for advocacy to public officials and/or dissemination to the public.

For the foregoing reasons, we respectfully request that the agency disclose redacted versions of the complaint narratives related to the 6,040 complaints about which information has already been produced and CFPB's response to these complaints. In addition, we ask that the agency grant MFY a fee waiver. We look forward to your prompt response.

Sincerely,



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