



U.S. Department
of Veterans Affairs

Office of the General Counsel
Washington DC 20420

In Reply Refer to ILG/024J
OGC Case #: 98677 & 96990
FOIA # 18-03259-F

September 13, 2018

Mr. David B. Rankin
Beldock Levine & Hoffman LLP
99 Park Avenue
PH/26th Floor
New York, NY 10016

Dear Mr. Rankin:

This letter responds to your email dated August 6, 2018, addressed to this office and your associated letter dated April 6, 2018, attached to that email.

Procedural History

(Historical) Initial Agency Decision (IAD) (VHA 10-02722-F): By way of historical perspective, the first IAD in response to a request for “a complete copy of the VA database known as the Beneficiary Identification and Records Locator Subsystem (BIRLS) Death File” was addressed to Mr. Chad Milliner of Ancestry.com in Provo, UT. By letter dated March 18, 2011, VHA issued a CD “which is the database you seek.”

Initial Request: On September 20, 2017, Ms. Brooke Schreier Ganz, President and Founder of Reclaim The Records requested “a copy of the Beneficiary Identification Records Locator Subsystem (BIRLS) Death file, a very large database maintained by your agency.” Ms. Ganz referenced that [T]his data has already been made available to the public before, and it is currently online at at least two major commercial genealogy websites, Ancestry.com and Fold3.com”

First Initial Agency Decision (IAD): On January 9, 2018, VBA Freedom of Information Act Officer (FOIA, 5 U.S.C. 552) Gwendolyn Smit, issued her IAD in response to Ms. Ganz’s initial request. Ms. Smith indicated that VBA “cannot provide a full copy of BIRLS Death File without releasing PII information; in withholding the information in its entirety, Ms. Smith relied upon FOIA exemption 6 (5 U.S.C. 552(b)(6)).

1st Appeal: By letter dated April 6, 2018, you appealed VBA's IAD, summarizing the communications Ms. Ganz provided to VBA. As part of the appeal, you cited the fact that a previous disclosure had been made to Ancestry LLP. You asserted that the information is not exempt from disclosure under FOIA exemption 6 because the information would contribute to the public's understanding of how government works and that contribution greatly outweighs any privacy interest in the responsive information. You pointed out that VBA's reliance upon exemption 6 was misplaced since, as Ms. Smith indicated, that exemption applies to a living person's personal privacy, and, by definition, the individuals identified in the BIRLS death file are deceased. Finally, you asserted that even if some of the information in the BIRLS death file is exempt that VA has a duty to segregate that information from that which is non-exempt.

1st Remand: By letter dated April 26, 2018, this office responded to your appeal. We informed you that we had determined that the custodian of the record for the BIRLS death file was VHA and not VBA and, accordingly, we referred the request to VHA for a response.

2nd Initial Agency Decision (IAD): By letter dated July 26, 2018, Ms. Deana Marakowski issued VHA's IAD. Ms. Marakowski informed you that the previous release to Ancestry.com on March 18, 2011 was erroneous, resulting in a data breach of veterans' personal information. She determined that FOIA "does not require or mandate VHA compound that mistake by continuing to provide the public with the BIRKS Death File previously released in error." Accordingly, the request for the information released by VHA to Ancestry.com was denied in its entirety.

2nd Appeal: Your email of August 6, 2018, appeals VHA's decision, and you point out that the information is "already in the public domain" and the "public interest in its disclosure far outweighs any [private] interest." You pointed to the arguments made in your April 6, 2018, letter, and pointed to the duty to identify any portions of the information withheld, provide an "index or similar statement of the scope of the material withheld, and specify the exemptions upon which the denial is based."

Relevant Law

We have thoroughly reviewed your appeal under the provisions of the FOIA, which provides that federal agencies must disclose records requested unless they may be withheld in accordance with one or more of nine statutory exemptions (5 U.S.C. § 552(b)).

Analysis

After our prior remand to VHA, this office has identified the problems with the BIRLS Death File data after it was released in 2011 to Ancestry.com. That release included information on living veterans, as it was possible for VA employees to mark a veteran as deceased and later make a correction to the veteran's file, but those corrections were not applied to the BIRLS death file. That software failure caused VHA to implement credit monitoring for thousands of veterans whose names or other information had been improperly released, and accordingly, the re-release of improperly disclosed information cannot, as VHA indicated, would not be legal.

We have also subsequently learned that VBA obtains certain death information from the Social Security Administration and employs that information for computer matching. That information is maintained by VBA with the BIRLS database, and, accordingly, we are remanding this matter to VBA for further consideration, appropriate segregation of exempt from non-exempt information, and a subsequent Initial Agency Decision.

Conclusion

This case is now remanded back to the VBA FOIA Officer for further consideration, appropriate processing, and the issuance of a subsequent IAD.

Mediation and Appeal Rights

This final agency decision concludes the administrative processing of your requests referred to above. As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services. Similarly, as part of the FOIA Improvement Act of 2016, VA established a FOIA Public Liaison to offer mediation services. Both OGIS and the VA Public Liaison will assist in resolving disputes between FOIA requesters and VA as a non-exclusive alternative to litigation. Using OGIS or the VA FOIA Public Liaison does not affect your right to pursue litigation. You may contact OGIS or the VA Public Liaison in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

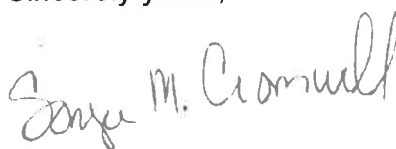
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

VA FOIA Public Liaison:
John Buck
VA FOIA Service
810 Vermont Avenue, NW (005R1C)
Washington, DC 20420

E-mail: vacofoiaservice@va.gov
Telephone: 1-877-750-3642
Facsimile: 202-632-7581

With respect to any information denied to you by this final agency decision, the FOIA requires us to advise you that if you believe the Department erred in this decision, you have the right to file a complaint in an appropriate United States District Court.

Sincerely yours,



Sonya M. Cromwell
Chief Counsel, Information Law Group

CC: Gwendolyn Smith, VBA FOIA Officer & Eugene Martin
John Buck, FOIA Service Public Liaison