



PROJECT ON
GOVERNMENT OVERSIGHT

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November 24, 2014

FOIA/PA Officer
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-001

FOIA/PA REQUEST

Case No.: 2015-0003A
Date Rec'd: 12/3/14
Specialist: Argent
Related Case: 2015-0007

Re: Freedom of Information Act (FOIA) / Privacy Act (PA) Appeal

Please consider this Freedom of Information Act (FOIA) appeal pursuant to 5 C.F.R. § 1303. On February 19, 2014, the Project On Government Oversight (POGO) submitted a FOIA request to the Office of Management and Budget (OMB) (Attachment A), requesting any documents related to the OMB Memorandum "Implementation of the Government Charge Card Abuse Prevention Act of 2012" (M-13-21)¹ as described herein:

1. The Charge Card Management Plans from each executive agency required to be submitted to the OMB by January 31, 2014.
2. The semi-annual Joint Purchase and Integrated Card Violation Reports from each executive agency required to be submitted to the OMB by January 31, 2014.
3. The semi-annual Joint Purchase and Integrated Card Violation Reports and related documents providing summary descriptions of confirmed violations involving misuse of a purchase card or integrated card
4. The semi-annual Joint Purchase and Integrated Card Violation Reports and related documents providing descriptions of all adverse personnel actions, punishments, or other actions taken in response to each reportable violation involving misuse of a purchase or integrated card.

This FOIA request was forwarded to all agencies, including the U.S. Nuclear Regulatory Commission (NRC). On October 28, 2014, POGO received a response from NRC stating that "certain information in the requested records is being withheld from disclosure pursuant to [FOIA Exemption 2]" at 5 U.S.C. 552(b)(2). (Attachment B) The response stated that "the withheld information relates solely to the internal personnel rules and practices of NRC."

Introduction of legal standard:

The exemption to FOIA at 5 U.S.C. 552(b)(2) (hereafter the (b)(2) exemption) has traditionally had two separate standards of review, known in practice as the "low (b)(2)" and the "high (b)(2)"

¹ Silvia Burwell, *Memorandum for the Heads of Executive Departments and Agencies, M-13-21*, available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-21.pdf>.

standards established by the Supreme Court in Dep't of Air Force v. Rose, 425 U.S. 352 (1976). The "high (b)(2)" standard created in Rose was overturned by the Supreme Court in Milner v. Dep't of the Navy, 131 S. Ct. 1259 (2011). The court in Milner refused to extend the (b)(2) exemption to matters previously covered under the "High (b)(2)" standard. An agency must now meet a single standard in order to legitimately withhold information under FOIA based closely on the statutory language, but the agency withholding information must meet the burden of proof as to the nature of the material (See Morley v. CIA 508 F3d 1108 (D.C. Cir. 2007)).

The new (b)(2) test:

In order for requested information to be legitimately withheld under exemption (b)(2), the exemption must meet three requirements (See Milner supra). First, the information must relate to personnel procedures such as "the selection, placement, and training of employees." *Id.* at 1264. Second, the information must be internal. *Id.* at 1265 n.4. Third, the internal information must be **solely** related to the internal personnel functions of an agency. *Id.*

The information requested is not personnel information:

The information requested by POGO was created by agencies that report to OMB in order to comply with the Government Charge Card Abuse Prevention Act (Pub. Law 112-194). As such, the information requested by POGO does not relate to personnel practices, rather the documents requested exist in order to comply with reporting requirements and these documents would not have been transmitted to OMB except for the requirements imposed by the Government Charge Card Abuse Prevention Act, so even if the reports detail personnel rules, regulations, and/or discipline, the information requested is not personnel information under the Supreme Court's formulation in Milner.

The information requested is not internal:

The information requested by POGO is not internal to any one agency. In Public Citizen Inc. v. OMB, 598 F.3d 865, 440 (D.C. Cir 2009) the court made a differentiation between information that moved between agencies and information that was constrained to a single agency "Exemption 2 covers documents that are 'related solely to the *internal* personnel rules and practices of *an* agency". The documents requested by POGO do not meet this standard. The documents report conduct by particular agencies, including NRC, which that agency then prepared for use by OMB, so the information requested cannot be construed as being "internal" to NRC.

The information is not solely internal personnel functions:

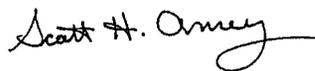
The formulation of the second and third (b)(2) requirements, as articulated Milner supra, mirrors the jurisprudence that the "low (b)(2)" exemption has traditionally had. This standard has been constructed by the Court as information in order to "relieve agencies of the burden of assembling and maintaining for public inspection matter which the public could not reasonably be expected to have an interest." (Rose, at 369, 370). In this case, the information that POGO has requested is not a trivial matter. The information requested details abuses of the purchase card program and the steps that agencies have taken to correct abuses. The public has a legitimate interest in federal spending of taxpayer dollars. The public has a vested interest in the ways that the government seeks to prevent fraud, and the reactions that government agencies have taken to correct these abuses.

Additionally, there have been multiple guilty verdicts and plea agreements involving purchase card waste, fraud, and abuse. The public deserves to learn more about the activities of the government and the actions it is taking to fight the problem. In fact, purchase card incidents are not much different than other procurement fraud issues; similar to government officials who are involved in bribery or kickback schemes. The issues are very much related to the administration and oversight of federal spending.

Furthermore, almost every other federal agency that utilizes these cards has responded positively to POGO's request and has forwarded us its Purchase Card and/or Travel Charge Card Management Plans. NRC is alone in withholding this information, leading us to believe that there is something the agency is attempting to conceal from the public.

For the reasons and legal precedent established in Milner, and Rose, POGO asks NRC to reconsider its decision to withhold its Travel Charge Card Management Plan. Please contact us if this request requires further clarification. I can be reached at 202-347-1122 or via email at scott@pogo.org. Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Scott H. Amey". The signature is written in a cursive style with a long horizontal flourish at the end.

Scott Amey
General Counsel