



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

Stop 9612

October 27, 2005

Bill Frizzell
Frizzell Law Firm
305 S. Broadway, Suite 302
Tyler, TX 75702

Re: Appeal, Freedom of Information Act (FOIA) Request No. 2005-5834

Dear Mr. Frizzell:

I am responding to your June 10, 2005, Freedom of Information Act (FOIA) appeal of the decision of the FOIA/Privacy Act Officer, Securities and Exchange Commission, denying your request for documents relating to CMKM Diamonds, Inc. On June 3, 2005, the FOIA Officer denied access to nonpublic investigative records pursuant to FOIA Exemption 7(A).

Regarding item (1) of your request, in which you were seeking "fails-to-deliver" data for CMKM Diamonds, Inc. for the period of April 1, 2005 through April 30, 2005, this information would normally be protected, at a minimum, pursuant to Exemption 8 of the FOIA. Exemption 8 provides for the withholding of matters that are "contained in or related to examination, operating, or condition reports." 5 U.S.C. 552(b)(8). Since you stated, however, in your May 16, 2005 request letter that you would accept the information in the aggregate instead of by clearing firm, I have determined in my discretion to release that information to you. This discretionary release should not be interpreted as a waiver of Exemption 8 in the event that you make a request for similar information in the future. Please find a copy of the responsive information attached hereto.

Regarding item (2) of your request, in which you were seeking what you call "Rec. A Sheets" in connection with item (1) above, please be advised that the Commission does not collect or maintain such records. Therefore, there are no records responsive to this portion of your request.

Finally, with respect to item (3) of your request in which you sought information from the

Commission to the NASD regarding CMKM Diamonds, Inc., I am satisfied that the FOIA Officer correctly asserted Exemption 7(A).¹ Staff responsible for the Commission's investigation have confirmed that releasing the withheld information could reasonably be expected to interfere with an on-going Commission investigation. See OKC Corp. v. Williams, 489 F. Supp. 576 (N.D. Tex. 1980) (SEC is not required to disclose requested materials directly tied to a pending investigation); National Public Radio v. Bell, 431 F. Supp. 509, 514 (D.D.C. 1977) (Congress intended that Exemption 7(A) would apply where disclosure may impede any necessary investigation prior to court proceedings); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978) (Congress intended that Exemption 7(A) would apply "whenever the Government's case in court * * * would be harmed by the premature release of evidence or information"); Accuracy in Media, Inc. v. U.S. Secret Service, C.A. No. 97-2108, 1998 U.S. Dist. Lexis 5798, at *11 (D.D.C. April 16, 1998)(affirmation that there is an active and on-going investigation is enough).

On appeal, you assert that the agency has not met its obligation to demonstrate that release of the requested information would interfere with the ongoing investigation. An agency, however, need not make a particularized showing of interference. See Wichlacz v. United States Dep't of Interior, 938 F. Supp. 325, 331 (E.D. Va. 1996) (holding that a "particularized showing of interference is not required; rather, the government may justify nondisclosure in a generic fashion."). Furthermore, an agency may withhold records under Exemption 7(A) on a categorical basis. See In re Dept. of Justice, 999 F.2d 1302, 1308 (8th Cir. 1993) (en banc) ("Supreme Court has consistently interpreted Exemption 7 of the FOIA (specifically so far as subsections 7(A), 7(C) and 7(D))" to permit the government to proceed on a "categorical basis"); OKC Corp. v. Williams, 489 F. Supp. 576 (N.D. Tex. 1980) (SEC is not required to disclose requested materials directly tied to a pending investigation).

Finally, you request in your appeal letter that the Commission assert any and all applicable exemptions that may apply to the documents. However, because Exemption 7(A) is temporal in nature, agencies do not ordinarily determine what other, underlying exemptions are appropriate until the underlying investigation reaches a point at which the documents no longer merit Exemption 7(A) protection. See Computer Prof'ls for Sec. Responsibility v. United States Secret Serv., 72 F.3d 897, 906-07 (D.C. Cir. 1996) (permitting agency on remand to apply exemptions other than Exemption 7(A) for records of investigation which was terminated during litigation); Dickerson v. Dep't of Justice, 992 F.2d 1426, 1430 n.4 (6th Cir. 1993) (explaining that when Exemption 7(A) has become inapplicable, records may be processed using other FOIA exemptions). Accordingly, the agency is under no obligation to assert other exemptions at this time.

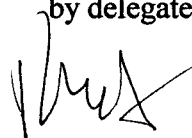
¹Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A), 17 CFR 200.80(b)(7)(i).

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Should you have a continuing interest in this information, you may contact the FOIA Office within six months of the date of this letter to determine if the status of the on-going law enforcement proceedings has changed. As Exemption 7(A) precludes the release of the information at this time, no determination has been made concerning the applicability of any other FOIA exemption. The Commission reserves the right to review the information to assert any other exemption when Exemption 7(A) is no longer applicable.

You have the right to seek judicial review of my determination by filing a complaint in the United States District Court for the District of Columbia or in the district where you reside or have your principal place of business. See 5 U.S.C. 552(a)(4)(B). If you have any questions concerning my determination, please call Noelle Frangipane, Staff Attorney, at 202-551-5142.

For the Commission
by delegated authority,



Richard M. Humes
Associate General Counsel

Enclosure

cc: FOIA Officer

TEMP

**Total Fails by Date for CMKX
April 1, 2005 to April 30, 2005**

cusip	CNS_Name	Ticker	Date	Total Fails
125809103	CMKM DIAMONDS INC	CMKX	20050401	5,000,000
125809103	CMKM DIAMONDS INC	CMKX	20050404	7,800,000
125809103	CMKM DIAMONDS INC	CMKX	20050405	17,800,000
125809103	CMKM DIAMONDS INC	CMKX	20050406	25,843,333
125809103	CMKM DIAMONDS INC	CMKX	20050407	56,129,333
125809103	CMKM DIAMONDS INC	CMKX	20050408	17,743,333
125809103	CMKM DIAMONDS INC	CMKX	20050411	44,743,333
125809103	CMKM DIAMONDS INC	CMKX	20050412	6,009,429
125809103	CMKM DIAMONDS INC	CMKX	20050413	1,000,000
125809103	CMKM DIAMONDS INC	CMKX	20050415	2,700,000
125809103	CMKM DIAMONDS INC	CMKX	20050419	84,800,000
125809103	CMKM DIAMONDS INC	CMKX	20050420	82,329,000
125809103	CMKM DIAMONDS INC	CMKX	20050421	125,329,000
125809103	CMKM DIAMONDS INC	CMKX	20050422	186,270,665
125809103	CMKM DIAMONDS INC	CMKX	20050425	102,770,665
125809103	CMKM DIAMONDS INC	CMKX	20050429	3,073,000

Note: Missing settlement dates have total fails of less than 10,000 shares.

Source: DTCC