United States Department of Energy
Office of Hearings and Appeals

In the Matter of Thomas R. Thielen	)	
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Filing Date: April 27, 2012	)	Case No.: FIA-12-0023
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Issued: June 28, 2012

Decision and Order

On April 27, 2012, Thomas R. Thielen filed an Appeal from a determination issued to him on March 9, 2012, by the Richland Operations Office (Richland) of the Department of Energy (DOE). That determination was issued in response to a request for information that Mr. Thielen submitted under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. This Appeal, if granted, would require Richland to release additional responsive material.

I. Background

Mr. Thielen filed a request for information with the DOE's Richland Operations Office concerning an investigation of retaliation for raising a safety concern. In this request, he sought a copy of documents regarding a safety concern he raised to CH2M Hill Plateau Remediation Company (CHPRC). On March 9, 2012, Richland issued a determination letter which stated that, according to CHPRC's contract with DOE, CHPRC's employee concern records are the property of the contractor and not subject to the provisions of the Freedom of Information Act or Privacy Act. *See* Determination Letter at 1. Richland released a copy of Mr. Thielen's DOE employee concern file, but withheld portions of the investigation summary included in the file pursuant to 5 U.S.C. § 552a(k)(5) (Exemption (k)(5) of the Privacy Act). According to the DOE, the information deleted from this document was obtained from sources who were promised confidentiality in exchange for their information. *Id.* On April 27, 2012, Mr. Thielen filed the present Appeal with the Office of Hearings and Appeals (OHA). He contends that the withheld information should be released to him because (1) he was retaliated against by CHPRC; (2) statements made during an investigation were not true, defamed his character and damaged his reputation; and (3) he has the right to defend allegations made against him and to clear his name. *See* Appeal Letter.

II. Analysis

Privacy Act Exemption (k)(5)

The Privacy Act was enacted to prevent the unnecessary dissemination of personal information compiled about individuals by federal agencies. Under the Privacy Act, each federal agency must permit an individual access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). However, under the Privacy Act, agencies may provide that some systems of records are not subject to the Act's disclosure provisions, but only to the extent that those records fall under certain specified exemptions. 5 U.S.C. § 552a(k).

In first-party requests such as this one, information responsive to the request is provided to the requester unless there is an exemption authorizing withholding. Applicable here is Privacy Act Exemption (k)(5).

Exemption (k)(5) of the Privacy Act permits the withholding of "investigatory material compiled solely for the purpose of determining suitability, eligibility or qualifications for Federal civilian employment, . . . or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence . . ." 5 U.S.C. § 552a(k)(5). *See Robert H. Calhoun*, 27 DOE ¶ 80,283 (2000). In creating Exemption (k)(5), Congress recognized the need to protect the sources of information to whom promises of confidentiality had been made. *See Chey Temple*, 25 DOE ¶ 80,194 (1996).

Richland informed us that the record requested by Mr. Thielen, his DOE employee concern file, was located in a system of records established under the Privacy Act, specifically DOE System of Records 3, Employee Concerns Program Records. *See* Appeal Letter; *see also* Record of E-mail Communication between Dorothy C. Riehle, Richland, and Kimberly Jenkins-Chapman, OHA (May 8, 2012). Pursuant to Exemption (k)(5) of the Privacy Act, Richland deleted the names of witnesses who were interviewed during the course of an investigation, specific job titles that could be used to identify witnesses and specific comments made by the witnesses, if they could be used to identify the witnesses. *Id.* Richland further informed us that the witnesses whose names and job titles were deleted requested confidentiality at the time of the interview and that there was an expressed promise between the government and the individuals that the identity of the sources would be held in confidence. However, after a careful review, we find that Privacy Act Exemption (k)(5) does not apply to the Appellant's employee concern file at issue. The information in question is not "investigatory material compiled solely for the purpose of determining suitability, eligibility or qualifications for Federal civilian employment, . . . or access to classified information . . .", and therefore Richland's initial determination to withhold under Exemption (k)(5) was incorrect. At this point, there is no basis to withhold any

portion of the requested information under the Privacy Act. Therefore we will remand this matter to Richland to either release the requested information in its entirety or justify withholding any portions of it under the Privacy Act. */

It Is Therefore Ordered That:

(1) The Appeal filed by Thomas R. Thielen, OHA Case No. FIA-12-0023, on April 27, 2012, is hereby granted in part as set forth in Paragraph (2) and is denied in all other respects.

(2) This matter is remanded to the Department of Energy's Richland's Office for further consideration in accordance with the instructions contained in the foregoing decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552a(g)(1). Judicial review may be sought
in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos

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*/ We note that courts have upheld the withholding of third-party personal information, including the identities of third parties, under the Privacy Act on the ground that the third-party information is not "about" the requester, and is therefore outside the scope of the Privacy Act and not subject to disclosure, pursuant to the Privacy Act's definition of a "record" as "any item, collection, or grouping of information about an individual . . ." (At 5 U.S.C. § 552a(a)(4)). *Haddon v. Freeh*, 31 F. Supp.2d 16, 22 (D. D.C. 1998). In addition, cases in which this issue have been raised typically require that agencies process first-party requests separately and independently under both the Privacy Act and the Freedom of Information Act (FOIA). *See Shapiro v. DEA,* 762 F.2d 611, 612 (7th Cir. 1985). It is DOE's established policy and practice to comply with this requirement and process requests under both the Privacy Act and the FOIA. Accordingly, Mr. Thielen's request should have been processed under the FOIA as well as the Privacy Act. However, only if there were grounds to withhold under each statute would the information be withheld from a requester. Under the FOIA, it is clear that Exemption 6, which shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" would justify the withholding of the information Richland initially withheld from the Appellant under the Privacy Act: the names of witnesses, and their job titles and comments to the extent they would reveal the witnesses' identities. 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). Release of this third-party information could result in harassment or harm to individuals who provided confidential information to the DOE. Furthermore, there would be no overriding public interest in disclosure. Accordingly, we determine here that the information at issue would appropriately be withheld under the FOIA. Nevertheless, since we have determined that Privacy Act Exemption (k)(5) cannot be applied to withhold that information from the Appellant, Richland may withhold that information only if, on remand, it justifies that withholding under the Privacy Act on another ground, such as the definition of "record" in 5 U.S.C. § 552a(a)(4). We also note that courts have recognized a privilege to protect information obtained based on promises of confidentiality when disclosure "would hamper the efficient operation of an important Government program." *Machin v. Zuckert*, 316 F.2d 336, 339 (D.C. Cir. 1963). *Accord Cooper v. Dept. Of Navy*, 558 F.2d 274, 277 (5th Cir. 1977) ("To permit a breach of assurances of confidentiality given in order to obtain answers to such questions as these may perhaps provide access to more information in that particular case, but common sense tells us that it will likely also assure that in future cases such information will never see the light of day and will be of use to no one.").

Director
Office of Hearings and Appeals

Date: June 28, 2012