United States Department of Energy
Office of Hearings and Appeals

In the Matter of William Berger	)	
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Filing Date: September 10, 2012	)	Case No. FIA-12-0051
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Issued: October 9, 2012

Decision and Order

On September 10, 2012, William Berger (Appellant) filed an Appeal from a determination issued to him on August 10, 2012, by the Department of Energy's National Nuclear Security Administration (NNSA) (FOIA Request Number FOIA-2012-00160-K), in response to a request for documents that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. NNSA, in its August 10, 2012, Determination Letter, informed the Appellant, *inter alia*, that it neither confirmed nor denied the existence of any records described in the Appellant's request. This Appeal, if granted, would require NNSA to either release any discovered documents or issue a new Determination Letter justifying the withholding of those documents.

I. Background

In his March 22, 2012, FOIA request (Request), the Appellant asked for the following information:

1. "The internal investigation OST conducted between February 27, 2012 and March 9, 2012. The investigation was in reference to alleged violations, including criminal allegations, conducted by Michael Rossetti and Paul Greoly. The investigation was conducted at Fort Chaffee, AR by Jeff Beck (Security Branch of OST) and James Allen (Special Investigator for Mr. Harrell), directly for the ADA, Mr. Harrell."

2. "The executive summary provided to Mr. Harrell with the findings of the allegations."

See Determination Letter. In its August 10, 2012, Determination Letter, NNSA informed the Appellant that it neither confirmed nor denied the existence of any such records described in the request.[1] *Id*. Citing FOIA Exemption 6, 5 U.S.C. §552(b)(6)[2], the Authorizing Official stated in

[1] An agency response to a FOIA Request, which states that the agency "can neither confirm or deny" the existence of responsive records because the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information or constitute an unwarranted invasion of personal privacy is often called a *Glomar*

the Determination Letter that an official acknowledgement of an investigation or an acknowledgment of the existence of investigatory records about an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy. In his Appeal, the Appellant challenges NNSA's determination.

II. Analysis

Courts have recognized, in the context of some FOIA requests, that even acknowledging that certain records exist would jeopardize the privacy interests that FOIA exemptions are designed to protect and that a *Glomar* response neither confirming nor denying the existence of responsive records is appropriate in such situations. *See, e.g., Antonelli v. FBI*, 721 F.2d 615, 617 (7th Cir. 1983) (*Antonelli*). Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized there to be a significant privacy interest in the mere confirmation or denial that an individual's name or other personal information is contained in investigative documents. *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991); *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990) (finding that withholding identity necessary to avoid harassment of individual). This strong privacy interest must be balanced against any specific public interest that would be furthered by the confirmation or denial of the existence of the requested documents. If the potential privacy interest outweighs the public interest that would be furthered by confirming or denying the existence of such documents, courts have held that agencies are justified in issuing a *Glomar* response neither confirming nor denying the existence of any responsive records. *See Beck v. Dep't of Justice*, 997 F.2d 1489, 1492-94 (D.C. Cir. 1994); *McNamera v. Dep't of Justice*, 974 F. Supp. 956, 957-60 (W.D. Tex. 1997). Using this rationale, the courts have upheld the use of a *Glomar* response where a FOIA request might reveal Exemption 6 information disclosing the identity of individuals who are subjects of investigations or are mentioned in law enforcement records and who have not previously waived their privacy rights. *See, e.g., Dep't of Justice v. Reporters Comm. for the Freedom of the Press*, 489 U.S. 749, 775 (1989); *Antonelli*.

In reviewing the interests to be balanced to justify Exemption 6 protection, it is apparent that, if responsive documents were to exist, the request at issue might reveal the identities and personal information of individuals involved in an investigation. For this reason, the mere confirmation or denial of the existence of responsive documents could, in and of itself, reveal exempt information. The NNSA has not officially acknowledged the investigation cited by the Appellant ever occurred or that an executive summary of such an investigation was ever provided to Mr. Harrell. By confirming or denying the existence of responsive records, the NNSA would be confirming or denying the existence of the investigation, which would, in and of itself, reveal personal privacy information protected by FOIA Exemption 6. Furthermore, the Appellant has not referenced any specific public interest that would be furthered by the release of the requested documents, or by the NNSA's confirmation or denial of their existence.

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response. *See Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (raising issue of whether CIA could refuse to confirm or deny its ties to Howard Hughes' submarine retrieval ship, the *Glomar Explorer*). We will refer to NNSA's response as a *Glomar* response.

[2] Exemption 6 shields from disclosure "[p]ersonnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6).

After reviewing the subject matter of the Request, the method by which the Request was processed, the NNSA justification offered in the Determination Letter, and the interests to be balanced, we find that NNSA appropriately invoked its *Glomar* response, neither confirming nor denying the existence of the investigatory records sought by the Appellant. Thus, we agree that providing any other response to the FOIA Request would constitute a clearly unwarranted invasion of personal privacy, such as that protected by Exemption 6. Consequently, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on September 10, 2012, by William Berger, OHA Case No. FIA-12-0051, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). 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. The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

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