United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Tom Thielen	)	
		)	Case No.: FIA-12-0057
Filing Date:	September 25, 2012	)	
		)	

Issued: November 1, 2012

Decision and Order

On September 25, 2012, Tom Thielen filed an Appeal from a determination issued to him on August 22, 2012, by the Department of Energy (DOE) Richland Operations Office (Richland) (Request No. PA 2012-00274). 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 previously filed a request seeking documents regarding a safety concern that he raised with his employer, CH2M Hill Plateau Remediation Company (CHPRC). In a March 2012 determination, Richland released to Mr. Thielen a copy of his employee concern file, but withheld certain 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). *See* Letter from Richland to Mr. Thielen (March 9, 2012) (March Determination) at 1. According to Richland, the withheld information was obtained from sources that were promised confidentiality in exchange for their information. *Id*. In April 2012, Mr. Thielen filed an Appeal of the March Determination with the DOE Office of Hearings and Appeals (OHA), challenging Richland's withholding of information in the investigation summary. *See* Letter from Mr. Thielen to OHA (April 27, 2012) (April Appeal).

In a June 28, 2012 decision, OHA issued a decision regarding the April Appeal. *See Thomas R. Thielen*, OHA Case No. FIA-12-0023 (2012).[1] In that case, we determined that Richland improperly applied Privacy Act Exemption (k)(5) in withholding information from the investigation summary in Mr. Thielen's employee concern file. *Id*. Specifically, we noted that Exemption (k)(5) permits the withholding of "investigatory material compiled solely for the purpose of determining suitability, eligibility or qualifications of Federal civilian employment . . . or access to classified information, but only to the extent that the disclosure of such material

[1] OHA FOIA decisions issued after November 19, 1996 may be accessed at http://www.oha.doe.gov/foia1.asp.

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 . . . " *Id.* at 2 (*quoting* 5 U.S.C. § 552a(k)(5)). After reviewing the withheld material, we determined that it did not fall within the scope of information that is exempt from disclosure under Exemption (k)(5) and, therefore, "Richland's initial determination to withhold under Exemption (k)(5) was incorrect." *Id.* In a footnote in that decision, we further noted that Richland did not process Mr. Thielen's request separately under both the Privacy Act and the Freedom of Information Act (FOIA), as is required for first-party requests. *See* 5 U.S.C. §§552a(t)(1), (2); *see also Shapiro v. DEA*, 762 F.2d 611, 612 (7th Cir. 1985). In considering whether the information in question should have been released to Mr. Thielen under the FOIA, we concluded that FOIA Exemption 6 justifies withholding the information because the release of the information in question – names of witnesses, job titles, and other information which would reveal their identities – would constitute a clearly unwarranted invasion of personal privacy, and there is no overriding public interest in disclosure of such information. *Thomas R. Thielen*, OHA Case No. FIA-12-0023 at 2, n.*. Nonetheless, given our finding that Richland could not withhold the information under the Privacy Act under Exemption (k)(5), we remanded the matter back to Richland to either release the requested information in its entirety or justify the withholding of any portions under the Privacy Act. *Id.* at 3.

In accordance with our instructions in the June 28, 2012, decision, Richland issued a new determination to Mr. Thielen. *See* Letter from Richland to Mr. Thielen (August 22, 2012) (August Determination). In the August Determination, Richland again released to Mr. Thielen his employee concern file and withheld the same portions of the investigation summary that it withheld in the March Determination, but this time did so pursuant to FOIA Exemption 6 on the grounds that its release "would constitute a clearly unwarranted invasion of personal privacy by subjecting the third-party individuals to unwanted communications, harassment, intimidation, retaliation or other substantial privacy invasions by interested parties." *Id.* at 1. Richland further determined that there was no overriding public interest in disclosure. *Id.* at 2. Finally, Richland found that Mr. Thielen was not entitled to disclosure of the withheld information under the Privacy Act because the information in question "contains third party related information that is not about [Mr. Thielen]," or does not pertain to him. *Id.* at 1. According to Richland, the third party information is not responsive to Mr. Thielen's request because it "does not meet the Privacy's Act's definition of a 'record,' which includes 'any item, collection, or grouping of information *about* an individual' under 5 U.S.C.a(a)(4)." *Id.* (emphasis added).

Mr. Thielen filed the instant Appeal on September 25, 2012. Letter from Mr. Thielen to OHA (September 25, 2012) (September Appeal). In the September Appeal, Mr. Thielen challenges Richland's withholding of information under the Privacy Act.[2]

II. Analysis

[2] Mr. Thielen did not challenge Richland's withholding of the information in question pursuant to FOIA Exemption 6. Therefore, the issue of whether Richland properly applied FOIA Exemption 6 in withholding the information is outside of the scope of the instant Appeal and will not be considered.

The Privacy Act was enacted to prevent unnecessary dissemination of personal information compiled about individuals by federal agencies. Under the Privacy Act, an individual is entitled to "gain access to his record or to any information pertaining to him which is contained in the system [of records] . . . ." 5 U.S.C. § 552a(d)(1). Under the Privacy Act, the term "record" means "any item, collection, or grouping of information about an individual that is maintained by an agency . . . ." 5 U.S.C. § 552a(a)(4). Agencies may, however, provide that some systems of records are not subject to the Privacy Act's disclosure provisions, but only to the extent that those records fall under certain specified exemptions. 5 U.S.C. § 552a(k).

At issue in this case is whether the withheld information included in the investigation summary in Mr. Thielen's employee concern file should be disclosed to Mr. Thielen under the Privacy Act's right of access provision, set forth at 5 U.S. C. § 552a(d)(1). The information in question includes the names and job titles of third-party witnesses, as well as statements by certain witnesses which, if disclosed, may reveal the witnesses' identities.

In considering requests for information under the Privacy Act, courts have consistently upheld the withholding of third-party personal information, including the identities of third parties, on the ground that such information is not "about" the requester and is, therefore, not the "record" of the requester, as defined in 5 U.S.C. § 552a(a)(4). For example, in *DePlanche v. Califano*, a father was denied access to the address of his minor children contained in his social security benefits file on the ground that the information was not "about" him, and therefore not his "record" as defined by the Privacy Act. *DePlanche v. Califano*, 549 F. Supp. 685, 695-96 (W.D. Mich. 1982). Similarly, other courts upheld the withholding of the identities of Federal Bureau of Investigation (FBI) agents included in requesters' records because those names did not constitute the requesters' "records" under the Privacy Act. *See, e.g.*, *Haddon v. Freeh*, 31 F. Supp. 2d 16 (D.D.C. 1998); *Nolan v. DOJ*, 1991 WL 36547, at *10 (D. Colo. Mar. 18, 1991). In this regard, in *Sussman v. U.S. Marshals Serv.*, the United States Court of Appeals for the District of Columbia, considering a first-party request for information under the Privacy Act, "interpret[ed] 5 U.S.C. § 552a(d)(1) to give parties access only to their own records, not to all information pertaining to them that happens to be contained in a system of records." *Sussman v. U.S. Marshals Serv*., 494 F.3d 1106, 1121 (D.C. Cir. 2007). The court explained that "[f]or an assemblage of data to qualify as one of [the requester's] records, it must not only contain his name or other identifying particulars but also be 'about' him." *Id*.

As noted above, on remand, Richland maintained that the withheld information was not "about" Mr. Thielen and, therefore, he was not entitled to its disclosure. We have carefully reviewed *in camera* the information in question. The withheld information appears in a document that Richland partially released to Mr. Thielen, titled "Referral Response Form," a summary of the investigation of Mr. Thielen's allegations in his employee concern complaint. The withheld names and job titles of third-party witnesses, as well as the withheld statements regarding the availability of certain witnesses for interviews, are very clearly not "about" Mr. Thielen, despite the fact that they are contained in his employee concern file. As such, that information does not constitute Mr. Thielen's "record" within the meaning of the Privacy Act. Therefore, Richland's withholding of that information was appropriate. We find, however, that the remaining withholdings are "about" Mr. Thielen because they are statements that specifically describe Mr.

Thielen and his work.[3] Moreover, the statements are maintained in a system of records, and are retrievable by Mr. Thielen's name. *See* E-mail from Dorothy Riehle, Richland, to Diane DeMoura, OHA (October 23, 2012) (confirming that the employee concerns file in question is retrievable by Mr. Thielen's name, but not the names or identifiers of witnesses or other interviewed parties). Therefore, we find that he is entitled to disclosure of that information under the Privacy Act's access provision, located at 5 U.S.C. § 552a(d)(1). Accordingly, we will remand this matter for further processing on this one narrow point. On remand, Richland should either release the withheld statements that we have identified as being "about" Mr. Thielen or issue a new determination justifying their withholding.

III. Conclusion

As discussed above, we have concluded that Richland appropriately withheld certain information from the responsive documents that it provided to Mr. Thielen on the ground that the information is not about Mr. Thielen and, therefore, not his record under the Privacy Act. We have further concluded, however, that two of the withheld statements are about Mr. Thielen and, as such, constitute his records under the Privacy Act. Consequently, we will grant the Appeal in part and remand this matter back to Richland for further processing regarding those two statements.

It Is Therefore Ordered That:

(1) The Appeal filed on September 25, 2012, by Tom Thielen, OHA Case No. FIA-12-0057, is hereby granted in part as set forth in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Department of Energy Richland Operations Office for further processing 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 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.

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[3] The specific withheld statements in the "Referral Response Form" that we find to be "about" Mr. Thielen are the following: (1) page two, paragraph three, line two and (2) page three, last paragraph, lines three through five (excluding the withheld witness name).

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