United States Department of Energy
Office of Hearings and Appeals

In the Matter of Avery R. Webster	)	
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Filing Date: June 18, 2013	)	Case No.: FIA-13-0042
	)	
	)	

Issued: July 17, 2013

Decision and Order

On June 18, 2013, Avery R. Webster (Appellant) filed an Appeal from a determination issued to her on May 31, 2013, by the Department of Energy (DOE) Office of Health, Safety and Security (HSS) (FOIA Request Number HQ-2013-00695-F). In its determination, HSS responded to the Appellant's request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. By letter dated March 12, 2013, the DOE Office of Information Resources (OIR) advised Appellant that the FOIA request was assigned to HSS to conduct a search of its files for responsive documents and to provide a response to the request. HSS found documents totaling 126 pages responsive to the Appellant's request. HSS withheld this information in its entirety pursuant to Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). Specifically, the Appellant appeals the applicability of Exemption 6 to the withheld material and requests release of the responsive documents that were withheld. Appellant also contends that instead of the responsive documents being withheld in their entirety, any non-exempt information should have been segregated and released, and exempt information should have been redacted and properly labeled. The Appellant further appeals the adequacy of the search for responsive records, and requests that an additional search be conducted and any responsive information released. This Appeal, if granted, would require an additional search for documents that the Appellant requested, as well as require the release of the information withheld pursuant to Exemption 6 or, in the alternative, the release of non-exempt information and the redaction and proper labeling of exempt information.

I. Background

On March 11, 2013, the Appellant submitted a FOIA request seeking "copies of any and all records that contain the time of arrival and/or departure of Office of Hearings and Appeals Director, Poli A. Marmolejos, from the DOE Forrestal Building, from August 2007 to present." The Appellant requested that DOE "search … all systems of records, including those in the possession of the named employee…. [as well as] the archive records or files of the named employee (and their respective office), along with any archived DOE electronic files." FOIA

request from Avery R. Webster (March 11, 2013). The OIR assigned the request to HSS to conduct a search of its files for responsive documents and to provide a response to the request. Interim Letter from Alexander C. Morris, FOIA Officer, OIR, to Avery Webster, at 1 (March 12, 2013).

On May 31, 2013, HSS issued a Determination Letter notifying the Appellant that it had searched its records and found 126 pages of responsive documents. HSS determined that this information, which consists of personal date/time and message text, should be withheld in its entirety, pursuant to Exception 6 of the FOIA, 5 U.S.C. § 552(b)(6). Determination Letter from Arnold E. Guevara, Director, Office of Headquarters Security Operations, HSS, to Avery Webster, at 1 (May 31, 2013). Subsequently, on June 18, 2013, OHA received the Appellant's Appeal of HSS's determination, wherein she challenges the applicability of Exemption 6, the decision of HSS not to provide responsive documents with non-exempt information segregated and released and with exempt information redacted and properly labeled, and the adequacy of the search for responsive records.

The Director, Office of Hearings and Appeals, referred this appeal to my office pursuant to a memorandum dated April 10, 2013, which delegated his authority, in cases that he would refer to me, to issue appellate decisions, as appropriate, under the FOIA and the Privacy Act, consistent with the purposes of the relevant Acts, as implemented by DOE FOIA and Privacy Act regulations, 10 C.F.R. Parts 1004 and 1008.

II. Analysis

In her appeal, Appellant challenges HSS's application of FOIA Exemption 6 to the 126 pages of responsive documents that HSS found. Appellant also challenges HSS's decision to withhold the responsive documents in their entirety, instead of providing the responsive documents with non-exempt information segregated and released, and with exempt information redacted and properly labeled. Appellant further appeals the adequacy of the search for responsive records. Upon review of the 126 pages of responsive documents and the facts of the search conducted by HSS, we conclude that HSS properly invoked Exemption 6 in support of its withholdings and that HSS properly withheld the documents in their entirety. We are also satisfied that the HSS conducted an adequate search for responsive documents.

A. Exemption 6

The FOIA requires that documents held by federal agencies generally be released to the public upon request. However, pursuant to the FOIA, there are nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)–(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B).

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar 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). The purpose of Exemption 6 is to "protect individuals from injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

To warrant protection under Exemption 6, information must first meet the threshold requirement that it fall within a category of "personnel," "medical" or "similar" files. 5 U.S.C. § 552(b)(6); 10 C. F. R. § 1004.10(b)(6). An agency should construe "similar" files broadly, "[T]o cover detailed Government records on an individual which can be identified as applying to that individual." *Wash. Post Co.*, 456 U.S. at 602 (citations and quotations omitted). Once the threshold question of Exemption 6 has been answered in the affirmative, an agency must undertake a three-step analysis to determine whether the information in question can be withheld under Exemption 6. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no significant privacy interest is identified, the record may not be withheld pursuant to this exemption. *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990); *see also Ripskis v. Dep't of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if privacy interests exist, the agency must determine whether or not release of the information would further the public interest by shedding light on the operations and activities of the government. *See Reporters Committee for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Nat'l Ass'n of Retired Federal Employees*, 879 F.2d at 874.

HSS invoked FOIA Exemption 6 to withhold 126 pages of documents responsive to the Appellant's request. HSS indicated that the information withheld consists of "personal date/time and message text." Determination Letter at 1. The Appellant argues that "[t]here is no reasonable explanation of why records that contain the time of ingress and egress …of a federal civil servant … from his main departmental building … during his official work hours … constitutes a 'clearly unwarranted invasion of personal privacy.'" Appeal at 1. We disagree.

In terms of the threshold question of Exemption 6, we have reviewed the 126 pages of documents found to be responsive to the Appellant's request. Those pages consist of the exact dates and times that the named employee entered and exited a Federal building, and the specific entrance and exit portals through which the employee passed. We conclude that those pages clearly constitute files "similar" to "personnel" and "medical" files for the purposes of the FOIA because those pages are "detailed Government records on an individual which can be identified as applying to that individual." *See Wash. Post Co.*, 456 U.S. at 602 (citations and quotations omitted).

Regarding the first prong of the Exemption 6 three-step analysis, we agree with HSS that there are legitimate privacy concerns that would be raised by the release of the 126 pages in question. As a general rule, "[t]he threat to privacy. . . need not be patent or obvious to be relevant." *See Wash. Post Co.*, 456 U.S. at 600. We have previously held that "we must examine the withheld

information in the context with which it is associated, i.e. what release of the information would specifically reveal about those particular persons." *Marlene Flor*, 26 DOE ¶ 80,104 (1996). In this regard, the release of the 126 pages at issue would reveal the exact dates and times that the named employee physically entered and exited one of the Federal buildings in which he worked, and the specific entrance and exit portals through which he passed. Though such information is not as revealing as a social security number, it does evoke personal privacy concerns in that it would reveal patterns in terms of the employee's daily habits that have little to do with the performance of the employee's official duties. Such information, if released, could subject the named employee to harassment, and possible injury, by revealing his patterns of being in a specific place at an exact time. Therefore, we find that substantial privacy interests would be implicated by the release of the 126 pages withheld by HSS.

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. The information withheld by HSS would, to a certain extent, shed light on the operations and activities of the government, in the sense that the release of the exact times at which an employee entered and exited one of the Federal buildings in which he worked, over a span of several years, would reveal the number of hours an employee spent working in that building. However, such information would only paint an incomplete picture of government operations and activities, because it would not include the hours worked by the employee in other Federal buildings and off-site, and therefore would not shed light on the aggregate number of hours worked by the employee. Despite this fact, we do find that the public has an interest in knowing the specific times that the named employee entered and exited one of the Federal buildings in which he worked.

In determining whether a record may be withheld under Exemption 6, courts have used a balancing test, weighing the privacy interest in withholding the information against the public interest in disclosing the information, in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Nat'l Ass'n of Retired Federal Employees*, 879 F.2d at 874. We have concluded above that there is a cognizable privacy interest at stake in this case. We have also concluded that there is a public interest in the disclosure of the information withheld by HSS. After a thorough examination, however, we find that the privacy interest outweighs the public interest in the disclosure of the 126 pages at issue. While there may be a cognizable public interest in the aggregate number of hours worked by a federal employee, *see James E. Minter*, 27 DOE ¶ 80,140 (1998), that public interest begins to become less certain when considering not just the aggregate number of hours worked, but the exact times, and locations of entrance and exit, of a federal employee from one of the Federal buildings in which he worked. The disclosure of such information, as discussed above, evokes substantial personal privacy concerns and could lead to harassment, and possible injury, which could have a deleterious effect on the named employee, and on employee morale and workplace efficiency. Under these circumstances, and after weighing the privacy interest in withholding the 126 pages against the public interest in disclosure, we determine that release of the 126 pages would constitute a clearly unwarranted invasion of personal privacy. Therefore, the responsive information at issue was appropriately withheld by HSS pursuant to FOIA

Exemption 6. Accordingly, we deny the portion of the Appeal challenging the decision of HSS to withhold responsive information pursuant to Exemption 6.

B. Segregability

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). However, material need not be segregated and released when the exempt and nonexempt material are so "inextricably intertwined" that release of the nonexempt material would compromise the exempt material, or where nonexempt material is so small and interspersed with exempt material that it would pose "an inordinate burden" to segregate it. *Lead Industries Assoc. v. OSHA*, 610 F.2d 70, 85 (2nd Cir. 1979). We have reviewed the responsive documents and conclude that they consist almost entirely of exempt information. The 126 responsive pages include no title page or table of contents. Each page consists of a three-column chart, with the three column headings "Message Type," "Message Text," and "Message Date/Time." All of the other information in the chart, on each of the 126 pages, is exempt under FOIA Exemption 6 for the reasons discussed above. For this reason, we conclude that HSS properly withheld the 126 pages in their entirety. Accordingly, we deny the portion of the Appeal challenging the decision of HSS to withhold the 126 pages in their entirety and not to provide the pages with labeled redactions.

C. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Project on Government Oversight*, Case No. TFA-0489 (2011).

The OIR initially assigned the request to HSS to conduct a search for responsive records and to respond to the request. In response to our inquiries, HSS provided us with information pertaining to the search that it conducted. HSS indicated that it conducted a search for the name of Poli Marmolejos within the Access Control System Electronic Card Reader Database for all entry and exit points from the Forrestal Building, and that the search returned 126 pages of responsive documents. Memorandum of telephone conversation between Mike Hamar, Physical Security Specialist, Office of Physical Protection, HSS, and Sean Tshikororo, Attorney-Adviser, Office of General Counsel (July 3, 2013, 11:29AM EDT). After our review of 126 responsive pages, we note that the information contained in those pages only goes back as far as February 2012. HSS informed us that the Access Control System Electronic Card Reader Database only contains information as far back as February 2012. Memorandum of telephone conversation between Mike Hamar, Physical Security Specialist, Office of Physical Protection, HSS, and Sean Tshikororo, Attorney-Adviser, Office of General Counsel (July 11, 2013, 9:30AM EDT). HSS

stated the reason for this was that prior to February 2012, a different system had been used to log badge swipes into and out of the Forrestal Building; and that the records from that earlier system had been disposed of in the past and are no longer held in any DOE system of records. *Id*.

As stated above, the standard for agency search procedures is reasonableness, which "does not require absolute exhaustion of the files." *Miller*, 779 F.2d at 1384–85. Here, in conducting a search for "copies of any and all records that contain the time of arrival and/or departure of Office of Hearings and Appeals Director, Poli A. Marmolejos, from the DOE Forrestal Building from August 2007 to present," HSS searched for the name of Poli Marmolejos within the Access Control System Electronic Card Reader Database for all entry and exit points from the Forrestal Building. HSS found the information sought by the request, except that the search did not find records before February 2012. However, based on the response of HSS to our inquiry, records before February 2012 do not exist in any DOE system of records. As such, we conclude that HSS conducted an adequate search for responsive documents.

However, we note that the Appellant requested, in the March 11, 2013 FOIA request, that DOE check all systems of records, including those in the possession of the named employee, who works in OHA. We conclude that the search should have been assigned to OHA, in addition to HSS. Accordingly, we will grant the Appeal to the extent that we will remand this matter back to OIR with directions that OIR assign the request to OHA for OHA to conduct a search for responsive records, and that OIR then issue a new determination with respect to OHA's search.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on June 18, 2013, OHA Case Number FIA-13-0042, is hereby granted as specified in paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the Office of Information Resources for additional proceedings consistent with the directions set forth in this 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. § 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.

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