**United States Department of Energy**
**Office of Hearings and Appeals**

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| In the Matter of Tim Hadley | ) | |
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| Filing Date: June 24, 2013 | ) | Case No.: FIA-14-0038 |
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Issued: July 14, 2014

## Decision and Order

On June 24, 2014, Tim Hadley (Appellant) filed an Appeal from a determination issued to him by the Office of the Inspector General (OIG) (Request No. HQ-2014-01102-F). In that determination, OIG responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. OIG found 13 responsive documents and released one in full. It withheld portions of four documents, referred one document to the Oak Ridge Office (Oak Ridge), and indicated that the Appellant had copies of seven documents. This Appeal, if granted, would require OIG to release the withheld portions of the four documents.

## I. Background

On May 13, 2014, the Appellant filed a request with the DOE for "[a]ll records, notes, correspondence, etc., reviewed to address Fraud complaint submitted to Hotline by Tim Hadley on May 1, [2013], against Progress Energy and Task order #13 addressed in the submitted mail (by Tim Hadley) concerning the IBM contract." Request E-mail dated May 13, 2014, from Appellant to FOIA-Central, OIR, DOE. OIG was tasked with responding to the request. In its determination, OIG stated that it located 13 responsive documents. June 24, 2014, Determination Letter from Rickey R. Hass, Deputy Inspector General for Audits and Inspections, OIG, to Appellant. In that determination, OIG released Document 4 in full, withheld portions of Documents 1, 2, 5, and 6 under Exemptions 4, 5, 6, and 7(C), and indicated that Documents 3, 7, 8, 10, 11, 12, and 13 had either already been provided to him, were addressed to him, or were written by him. *Id.* OIG also referred Document 9 to Oak Ridge. *Id.* On June 24, 2014, the Appellant appealed challenging OIG's withholdings, stating that "I appeal the decision as it [doesn't] follow the [statute] for valid exceptions." Appeal E-mail dated June 24, 2014, from

Appellant to Janet R. H. Fishman, Attorney-Examiner, Office of Hearings and Appeals (OHA), DOE.

## II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists 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. *See* 5 U.S.C. § 552(a)(4)(B). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. We must consider whether OIG properly withheld information under Exemptions 4, 5, 6, and 7(C).

### A. Exemption 4

Exemption 4 shields from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines that the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a "trade secret," a different analysis applies. The agency must determine whether the information in question is "commercial or financial," "obtained from a person" and "privileged or confidential."

OIG withheld information from Document 5 under Exemption 4. OIG is not claiming that the information constitutes a "trade secret." Therefore, the first requirement is that the withheld information be "commercial or financial." Federal courts have held that these terms should be given their ordinary meanings and that records are commercial as long as the submitter has a "commercial interest" in them. *Public Citizen*, 704 F.2d at 1290. The information submitted by the contractors, *i.e.*, payroll reports, statements of compliance, fringe benefits statements and statements of non-performance, clearly satisfy the definition of commercial or financial information. The second requirement is that the information be "obtained from a person." It is well-established that "person" refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc., v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, Case No. TFA-591 (2000).[1/] The contractors

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

satisfy that definition. Finally, in order to be exempt from disclosure under Exemption 4, the information must be "confidential."

The information withheld by OIG consists of contract cost agreements, dates of contract agreements and deliveries, amounts of product delivered or received, total costs of products, maintenance, or production, and financial costs. In this case, the participating company was required to submit the documents in question as part of its contract with DOE. Accordingly, we find that the withheld information was "involuntarily submitted." In order for the application of Exemption 4 to be proper, the *National Parks* test must be applied. Under *National Parks*, involuntarily submitted withheld information is confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future; or (b) cause substantial harm to the competitive position of submitter. *National Parks*, 498 F.2d at 770.

OIG determined that release of the commercial and financial information contained in the documents would likely cause the participating company substantial competitive harm. "Disclosing the information redacted would cause participating companies financial harm by revealing to their competitors information about their financial costs." June 24, 2014, Determination Letter. We believe that release of the information would give the competitors an undue advantage when submitting proposals in the future. In addition, release of the financial information in particular would give the competitors an undue advantage in bidding on future contracts. Therefore, we find that OIG properly applied Exemption 4 to the withheld information in Document 5.

**B. Exemption 5**

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges, among others, that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In its determination, OIG withheld information pursuant to Exemption 5's deliberative process privilege. In order to be shielded by this privilege, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866.

The deliberative process privilege does not exempt purely factual information from disclosure. *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). However, "[t]o the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." *Id.* The deliberative process privilege routinely protects certain types of information, including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer

rather than the policy of the agency." *Coastal States*, 617 F.2d at 866. The deliberative process privilege assures that agency employees will provide decision makers with their "uninhibited opinions" without fear that later disclosure may bring criticism. *Id*. The privilege also "protect[s] against premature disclosure of proposed policies before they have been . . . formulated or adopted" to avoid "misleading the public by dissemination of documents suggesting reasons and rationales . . . which were not in fact the ultimate reasons for the agency's action." *Id*. (citation omitted).

OIG withheld information from Document 2 under Exemption 5. We have reviewed the information withheld by OIG under the Exemption 5 "deliberative process privilege." As OIG stated in its determination, the information redacted reflects the advisory opinions between subordinates and their management. We find that disclosure of this material would inhibit frank and open discussions and would hinder the DOE's ability to reach sound and well-reasoned solutions. Therefore, we find that the withheld information falls under Exemption 5.

### C. Exemption 6

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). In the present case, the Appellant argues that the database documents are not the type of files that may be protected under Exemption 6. However, the Supreme Court and other federal courts have given the phrase "personnel and medical files and similar files" a broad meaning when a requested document refers specifically to an individual. *See, e.g., Washington Post*, 456 U.S. at 602; *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1024 (9th Cir. 2008) (stating that the threshold test of Exemption 6 is satisfied when government records contain information applying to particular individuals). Documents 1, 2, 5, and 6, contain information that applies to particular individuals, such as names, initials, and signature; titles; and telephone numbers.

In determining whether a record may be withheld under Exemption 6, an agency must perform a three-step analysis. First, the agency must determine if a significant privacy interest would be compromised by the disclosure of the record. If the agency cannot find a significant privacy interest, 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) (NARFE); *see also Ripskis v. Dep't of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if an agency determines that a privacy interest exists, the agency must then determine whether the release of the information at issue would further the public interest by shedding light on the operations and activities of the government. *See Reporters Comm. for Freedom of the Press v. Dep't of Justice*, 489 U.S. 769, 773 (1989) (Reporters Committee). Lastly, 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 NARFE*, 879 F.2d at 874.

OIG withheld information under Exemption 6 from Documents 1, 2, 5, and 6. The initial step in analyzing whether Exemption 6 has been properly applied to withhold information is, as stated above, determining whether or not a significant privacy interest would be compromised by the disclosure of the name of a person who is not a federal employee and in the information which would identify the federal OIG employees who worked on these cases.

With regard to the name of a non-federal employee, it is well settled that the release of an individual's name to the public implicates a privacy interest under the FOIA. *Associated Press v. Dep't of Justice*, 549 F.3d 62, 65 (2d Cir. 2008). Therefore, OIG correctly concluded that a person who is not an employee of the federal government has a legitimate expectation of privacy under the FOIA and his name can be withheld.

With regard to information identifying the names and signatures of current federal OIG employees, we find that there is a significant privacy interest. Generally, civilian federal employees who are not involved in law enforcement generally have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations as employees. *See Office of Pers. Mgmt. Regulation*, 5 C.F.R. § 293.311 (2009) (specifying that certain information contained in federal employee personnel files is available to public). However, federal employees involved in law enforcement do possess, by virtue of the nature of their work, protectable privacy interests in their identities. *Wood v. FBI*, 432 F.3d 78, 87-89 (2d Cir. 2005) (protecting investigative personnel of FBI's Office of Professional Responsibility); *Judicial Watch, Inc. v. United States*, 84 F. App'x 335, 338-39 (4th Cir. 2004) (protecting names of lower-level clerical workers at IRS).

We have consistently held that OIG is a law enforcement agency. *See, e.g., Steven Wallace*, Case No. VFA-0735 (2002). We, therefore, find that the federal OIG employees listed in the documents have a significant privacy interest regarding release of their identities in that such a release could subject them to unwanted contact and harassment. *Cal-Trim Inc. v. IRS*, 484 F. Supp. 2d 1021, 1027 (D. Ariz. 2007) (protecting names of lower-level IRS employees in internal IRS correspondence so as not to expose them to unreasonable annoyance or harassment). Release of the titles could lead to identifying those individuals.

Because we find that a protectable privacy interest exists, we must now consider if release of the withheld information would further the public interest by shedding light on the operations and activities of the government. It is clear that release of the name of a person not employed by the federal government would not further the public interest by shedding light on the operations and activities of the government. Release of this information would contribute little, if any, to public understanding of the issues surrounding this investigation. We find that the public interest in the withheld name is minimal at best. Release of the information would reveal little, if anything, to the public about the workings of the government. *Elec. Frontier Found. v. Office of the Director of Nat'l Intelligence*, 639 F.3d. 876, 888 (9th Cir. 2010).

As a general matter, the courts have not found that release of individual federal employee names, when presumptively withholdable, provides any light to the workings of a federal agency. *See Voinche v. FBI*, 940 F.Supp. 323, 330 (D.D.C. 1996) ("There is no reason to believe that the public will obtain a better understanding of the workings of various agencies by learning the

identities of [various federal employees]"). In reviewing the documents, we find that no additional information regarding OIG operations would be disclosed by release of the withheld information. While the Appellant argues that the public interest would be furthered by the release of these names by ensuring that federal employees are following federal, state, and professional associations' standards of conduct and adhering to the same agency's policies and procedures, such a speculative public interest in detecting potential wrongdoing is insufficient to satisfy the public interest standard required under the FOIA. *See Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157 at 173 (2004); *Dep't of State v. Ray*, 502 U.S. 164, 179 (1991)("[i]f a totally unsupported suggestion that the interest in finding out whether government agents have been telling the truth justified disclosure of private materials, government agencies would have no defenses against requests for production of private information.") Consequently, we find that there is no public interest that would be furthered by release of the information withheld in Documents 1, 2, 5, and 6.

In applying the Exemption 6 balancing test, we have found that there is a significant privacy interest in the name of the non-federal employee and the names of current federal OIG employees. Additionally, we find that there is little or no public interest that is furthered by release of the withheld information. In balancing these factors pursuant to Exemption 6, we find that release of the withheld information would constitute a clearly unwarranted invasion of personal privacy. Consequently, Exemption 6 was properly invoked to withhold the redacted information.

### D. Exemption 7(C)

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes," if release of such law enforcement records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); *see also* 10 C.F.R. § 1004.10(b)(7)(iii). In its June 24, 2014, notification letter to the Appellant, OIG claimed that it was withholding information from Documents 1, 2, 5, and 6 under Exemption 7(C). In addition, OIG stated in its letter that some information was being withheld under Exemption 7(C) of the FOIA.

The analysis is similar to the analysis conducted under Exemption 6; however, Exemption 7(C) applies to a much narrower class of documents than Exemption 6, but it has a less exacting standard that provides more expansive coverage. Both Exemptions 6 and 7(C) require a balancing of the personal privacy interest in the information proposed for withholding against the public interest in the same information. There are, however, two significant differences between Exemption 6 and 7(C). Pursuant to Exemption 7(C), the information must have been compiled for law enforcement purposes. Furthermore, since Exemption 7(C) allows an agency to withhold information where there is only a reasonable expectation of an "unwarranted invasion of personal privacy," Exemption 7(C) has a lower threshold of privacy interest than Exemption 6 where the balancing test calls for a "clearly unwarranted invasion of personal privacy."

Pursuant to the provisions of Exemption 7(C), we have reviewed Documents 1, 2, 5, and 6 and found that they do constitute law enforcement activities. *See Ken Hasten*, Case No. TFA-0353 (2010). Since these documents meet Exemption 7(C)'s threshold test, and since we have already

indicated that the information was properly withheld under Exemption 6, we will uphold OIG's withholding under Exemption 7(C).

### E. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The balancing test under DOE regulations does not apply to certain exemptions, including Exemptions 4, where it is prohibited by statute, and Exemptions 6 and 7(C), where it is part of the underlying analysis. Therefore, in this case, section 1004.1 only applies to the determination we made under Exemption 5, and we found no public interest in its disclosure. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. As discussed above, we find that release of the redacted information would not further the public interest. Therefore, section 1004.1 does not require the release of the withheld information.

## III. Conclusion

After reviewing the Appellant's Appeal, we are convinced that OIG properly withheld the information under Exemptions 4, 5, 6, and 7(C) of the FOIA. Accordingly, that Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Tim Hadley, Case No. FIA-14-0038, 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 the provisions of 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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Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

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