United States Department of Energy
Office of Hearings and Appeals

In the Matter of Tim Hadley	)		
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Filing Date: June 25, 2014	)	Case Nos.:	FIA-14-0036
	)		FIA-14-0039
	)		FIA-14-0040
	)		

Issued: July 21, 2014

Decision and Order

On June 25, 2014, Tim Hadley (Appellant) filed an Appeal from determinations issued to him by the Office of the Inspector General (OIG), the Oak Ridge Office (Oak Ridge), and the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2014-00743-F). In those determinations, the DOE 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. These Appeals, if granted, would require the DOE to release seven partially released documents in full. As explained below, we have determined that the Appeal with respect to six of the documents was untimely and, therefore, should be dismissed and that the Appeal with respect to the remaining document should be denied.

I. Background

On March 19, 2014, the Appellant filed a request with the DOE for "all information relating to OAS-RA-14-03 collected from any agency, entity or company to compile report." Request E-mail dated March 19, 2014, from Appellant to FOIA-Central, OIR, DOE. OIG was tasked with responding to the request. In its first, partial determination, OIG stated that it located 30 responsive documents. April 9, 2014, Determination Letter from Rickey R. Hass, Deputy Inspector General for Audits and Inspections, OIG, to Appellant. In that determination, OIG released nine documents in full and withheld portions of four documents under Exemptions 4, 6, and 7(C). *Id.* OIG also referred documents to Oak Ridge, the Office of Electricity Delivery and Energy Reliability (OE), and the National Energy Technology Laboratory (NETL). *Id.* On April 29, 2014, OIG stated that NETL determined that the documents referred to it were actually the property of OE, and the OIG forwarded those documents to OE. April 29, 2014, Determination

Letter from Rickey R. Hass to Appellant. OIG also stated that it was partially releasing two documents, with portions withheld under Exemptions 4 and 6. *Id.* On May 28, 2014, OIR responded with respect to three of the documents that had been referred to OE. May 28, 2014, Determination Letter from Alexander C. Morris, FOIA Officer, OIR, to Appellant. OIR released two documents in full and partially released portions of the third document, citing withholdings under Exemptions 5, 6, and 7(C). On June 19, 2014, Oak Ridge released two documents in full. June 19, 2014, Determination Letter from Amy Rothrock, FOIA Officer, Oak Ridge, to Appellant. Both the OIR and the Oak Ridge determinations indicated that they were still reviewing responsive documents.

On June 20, 2014, the Office of Hearings and Appeals received a submission from the Appellant, styled as a FOIA appeal. Appeal E-mail dated June 18, 2014, from Appellant to Director, Office of Hearings and Appeals (OHA), DOE. On June 25, 2014, the Appellant perfected his Appeal by identifying the determinations that he was appealing. *See* 10 C.F.R. § 1004.8(b).

II. Analysis

A. April 9, 2014, and April 29, 2014, Determinations from OIG

In its two April 2014 determinations, OIG released nine documents (Documents 1 through 5, 20, 21, 27, and 29) in their entirety. April 9, 2014, Determination. The OIG also partially released portions of six documents (Documents 13, 16, 17, 19, 26, and 30), citing withholdings under Exemptions 4, 6, and 7(C). April 9, 2014, and April 29, 2014 Determination. DOE FOIA regulations state that "the requester may, within 30 calendar days of its receipt, appeal the determination to the Office of Hearings and Appeals." 10 C.F.R. 1004.8(a). OIG has informed us that the Appellant received the two letters on or before May 9, 2014. June 30, 2014, E-mail from OIG to Janet Fishman. Since the Appellant's Appeal was perfected on June 25, 2014, over 30 days from May 9, 2014, the Appeal of OIG's April 2014 determinations is not timely. Therefore, we will dismiss that Appeal, which has been designated Case No. FIA-14-0039.

B. June 19, 2014, Determination from Oak Ridge

In its June 19, 2014 Determination, Oak Ridge did not withhold any documents. June 19, 2014 Determination. Instead, it released two documents (Documents 6 and 9) in their entirety. *Id.* On June 30, 2014, Oak Ridge informed OHA that it had released an additional four documents (Documents 11, 14, 24, and 25) in their entirety. June 30, 2014, E-mail from Amy Rothrock to Janet Fishman. Oak Ridge also stated that it was still reviewing two documents (Documents 10 and 15).[1/] *Id.* Accordingly, there is nothing to appeal from the June 19, 2014, determination. The circumstances for an administrative appeal do not yet exist because, as of the date of this Appeal, Oak Ridge had not yet denied a request for records in whole or in part, responded that there are no documents responsive to the request or denied a request for waiver of fees. *See* 10 C.F.R. § 1004.8(a). Therefore, we will dismiss the Appeal of the Oak Ridge determination, which has been designated Case No. FIA-14-0040.

[1/] Oak Ridge may have issued a determination regarding Documents 10 and 15 on July 11, 2014. If the Appellant wishes to challenge that determination, he may do so in a new Appeal.

C. May 28, 2014, Determination from OIR

In its May 28, 2014, determination, OIR released two documents (Documents 8 and 23) in their entirety. May 28, 2014, Determination. OIR withheld portions of one document (Document 12) under Exemptions 5, 6, and 7(C).[2/] We must consider whether those exemptions were properly invoked.

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.

1. Exemption 5

Exemption 5 protects from disclosure "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 the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits the withholding of responsive material that, *inter alia*, reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1974). In order to be shielded by this privilege – generally referred to as the "deliberative process 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 Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

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

[2/] OE released one document even though it had previously been released to the Appellant under Request No. HQ-2011-00557-F. May 29, 2014, Determination. OE was under no obligation to re-release the document.

suggesting reasons and rationales . . . which were not in fact the ultimate reasons for the agency's action." *Id*. (citation omitted).

In this case, we have reviewed Document 12, a portion of which OIR withheld pursuant to Exemption 5. The document is a chain of e-mails, which are clearly internal documents. The particular passage that OIR redacted contains recommendations, opinions, and other subjective matter. Consequently, after thoroughly reviewing Document 12, we find that the information withheld under the deliberative process privilege of Exemption 5 is pre-decisional and contains material that reflects DOE's deliberative process. Therefore, the information is exempt from mandatory disclosure under Exemption 5.

2. **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). The OIR determination indicated that the OIG redacted certain information from Document 12, concerning OIG personnel, such as names and a mobile telephone number.

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.

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 names of the OIG employees who worked on these cases. With regard to information identifying the names 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 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 OIG employees listed in the Document 12 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).

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. 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 Document 12, 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 DOE'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 names and mobile telephone number withheld in Document 12.

In applying the Exemption 6 balancing test, we have found that there is a significant privacy interest in the names current OIG employees. Additionally, we find that there is 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 in Document 12.

3. 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). Our review of the document does not show where the information was withheld under Exemption 7(C). We conferred with OIG and determined that the names of the agents on page 4 of Document 12 should have indicated that the names were being withheld under both Exemptions 6 and 7(C).

The Exemption 7(C) 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 Document 12 and found that the information does constitute law enforcement activities. *See Ken Hasten*, Case No. TFA 0353 (2010). Since Document 12 meets Exemption 7(C)'s threshold test, and since we have already indicated that the information was properly withheld under Exemption 6, we will uphold the withholding under Exemption 7(C).

4. 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. This additional step in the review process only applies to the determination we made under Exemption 5, because Exemptions 6 and 7(C) analysis already take into consideration the public interest in disclosure, and we found none. 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 the release of the information withheld under Exemption 5 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 Appeals, we have determined the Appeal of the OIG determinations dated April 9, 2014, and April 29, 2014, should be dismissed as untimely. We have also determined the Appeal of Oak Ridge's June 19, 2014, determination should be dismissed, because it made no adverse, appealable determination. Finally, we are convinced that the information withheld from Document 12 was properly withheld under Exemptions 5, 6, and 7(C) of the FOIA. Accordingly, that Appeal, designated as Case No. FIA-14-0036 should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Tim Hadley, Case No. FIA-14-0036, is hereby denied.

(2) The Appeals filed by Tim Hadley, Case Nos. FIA-14-0039 and FIA-14-0040, are hereby dismissed.

(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. § 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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Poli A. Marmolejos
Director
Office of Hearings and Appeals

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