United States Department of Energy
Office of Hearings and Appeals

In the Matter of Len Latkovski	)		
	)		
Filing Date: November 19, 2014	)	Case No.:	FIA-14-0082
	)		

Issued: January 14, 2015

Decision and Order

On November 19, 2014, Len Latkovski ("Appellant") filed an Appeal from a determination issued to him on September 25, 2014, by the Office of Intelligence and Counterintelligence (IN) of the Department of Energy (DOE) (FOIA Request No. HQ-2012-00181-F). In its determination, IN released three documents responsive to a request that the Appellant 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. IN withheld portions of those documents under Exemptions 1, 3 and 6 of the FOIA. The Appellant claims that IN did not conduct an adequate search for records and that it should not have applied Exemptions 1, 3 and 6 to the withheld information. This Decision and Order only pertains to withholdings of sensitive unclassified information under Exemptions 3 and 6 and to the adequacy of IN's search for requested documents.[1] Thus, this Appeal, if granted, would require IN to conduct another search for the documents that the Appellant requested and to release the information it withheld pursuant to Exemptions 3 and 6.

I. Background

In April 2012, the Appellant submitted a FOIA Request seeking documents pertaining to the following Soviet cities: Arzamas 16, Chelyabinsk-70, Sverdlvosk-45, Penza-19, Tomsk-7, Sverdlovsk-44, Krasnoyarsk-26, Krasnoyarsk-45 and Zlatoust-36. In addition, he requested information pertaining to the years 1945-1960 and searches specifically for the following areas:

1. Any information in regards to: a) construction of the cities and b) the process of making them closed cities and c) the use of prisoners and military battalions in the construction.
2. The daily lives of the citizens within the cities (such as radioactivity levels, wages of citizens, etc.)
3. Specific function of the cities during the period 1945-1960. This includes information held by the Atomic Energy Commission during the aforementioned time period, as well

[1] This Appeal has been bifurcated, and the Appellant's challenge to IN's invocation of Exemption 1 will be decided in another matter, Case No. FIC-14-0003. *See* Acknowledgment Letter from William M. Schwartz, Staff Attorney, OHA, to Appellant (Dec. 9, 2014).

as, research developments made after 1960 by the AEC and DOE in regards to the functions of the cities between 1945 and 1960.

4. Information regarding security officials (NKVD, KGB and MVD) and scientists working in these cities during this time period.

See Determination Letter from Principal Deputy Director, IN, to Appellant (Sept. 25, 2014). On September 25, 2014, IN responded to the Appellant's FOIA Request, stating that it released three documents that it withheld in part pursuant to Exemptions 1, 3 and 6. *Id.* IN invoked Exemption 6 for certain redactions stating that the withheld information "consists of names and other identifying data concerning persons mentioned in the responding document." *Id.* IN also invoked Exemption 3 to withhold information pursuant to the National Security Act of 1947. *Id.* The Appellant contends that IN should not have invoked Exemptions 1, 3 and 6, stating that the redactions "do not reflect the 'Open Government' Act intent and are an inherent invalidation of the government's policy for "opening up Cold War Archives." *See* Appeal.

In addition, the Appellant contests the adequacy of the search for responsive documents, asserting that only three documents were provided: "The Evolution of Russia's Nuclear Weapons Serial Production Complex" (September 2001); "Briefing Book Seversk" (September 2002); and "Uranium Enrichment Complex" (April 2010). The Appellant asserts that these documents were generated after the year 2000 and no documents from the years 1945 to 1960 were provided. *Id.* He further asserts that the redactions in each of the documents were too broad. *Id.*

II. Analysis

A. Adequacy of 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).[2]

IN provided us with information to evaluate the reasonableness of its search. In response to the Appellant's request, IN conducted a search by date and subject of all of its electronic holdings and paper files. IN further explained that it searched the terms used in the original request when conducting its search, but was unable to locate responsive documents aside from the documents that were provided in part to the Appellant. *See* Record of Telephone Conversation between IN, and Kimberly Jenkins-Chapman, Attorney Advisor, OHA (Dec. 8, 2014). Based on the foregoing, we are satisfied that IN has conducted an adequate search for documents.

[2] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.energy.gov/oha.

As stated above, a search for documents "does not require absolute exhaustion of the files," only a "search reasonably calculated to uncover the sought materials." *See Miller*, 779 F.2d at 1384-85. Thus, based on the foregoing, we are satisfied that an adequate search for responsive documents was conducted.

B. Exemption 3

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.

Exemption 3 of the FOIA provides that an agency may withhold from disclosure information "specifically exempted from disclosure by statute . . . if that statute -- (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . ." 5 U.S.C. § 552(b)(3); see 10 C.F.R. § 1004.10(b)(3).

Here, IN invoked Exemption 3 to support its withholdings in the three responsive documents pursuant to the National Security Act of 1947, 50 U.S.C. § 3001, *et seq.* The National Security Act qualifies as a withholding statute under Exemption 3. *See CIA v. Sims*, 471 U.S. 159, 167 (1985) ("Section 102(d)(3) of the National Security Act of 1947, which calls for the Director of Central Intelligence to protect 'intelligence sources and methods,' clearly 'refers to particular types of matters,' 5 U.S.C. § 552(b)(3)(B), and thus qualifies as a withholding statute under Exemption 3.").

The National Security Act allows for the redactions of both sensitive unclassified information and classified information, such as intelligence methodology and intelligence and counterintelligence personnel involved in these activities. *See* Memorandum of Conversation between IN, and Kimberly Jenkins-Chapman and William M. Schwartz, Attorney Advisors, OHA (January 9, 2015). We have reviewed and discussed with IN the sensitive unclassified information withheld from the three documents at issue and have determined that they consist of 1) the names and identities of intelligence community personnel, the disclosure of which could reveal the nature of intelligence activities, and 2) facets of information that when compiled provide indicators to other sensitive unclassified and classified information. *Id.* Accordingly, based on our review of these documents and the information provided by IN, we are satisfied that IN properly invoked Exemption 3 in support of its redactions in the subject documents as release of this information could damage national security by jeopardizing intelligence methods, sources and activities.

C. Exemption 6

In addition, IN invoked Exemption 6 to many of the same redactions that it made pursuant to Exemption 3 based on the National Security Act. 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 the 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 order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Dep't of Hous. and 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 document 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). 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 Ripskis*, 746 F.2d at 3.

IN stated that it invoked Exemption 6 to the redactions in the above-mentioned three documents because they contained the names of individuals as well as other personal identifying data involved in sensitive intelligence production. *See* Memorandum of Telephone Conversation between IN, and Kimberly Jenkins-Chapman, Attorney Advisor, OHA (Dec. 8, 2014); *see also* Memorandum of Conversation between IN, and Kimberly Jenkins-Chapman and William M. Schwartz, Attorney Advisors, OHA (January 9, 2015). Courts have recognized a privacy interest in protecting the identities of employees in both sensitive agencies and sensitive occupations, as those employees "face an increased risk of harassment or attack." *See Long v. Office of Personnel Mgmt.*, 692 F.3d 185, 192 (2d Cir. 2012); *see also Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 152 (D.C. Cir. 2006) ("We have also read the statute to exempt not just files, but also bits of personal information, such as names and addresses, the release of which would 'create[] a palpable threat to privacy."); *Wood v. FBI*, 432 F.3d 78, 88 (2d Cir. 2005) ("whether the disclosure of names of government employees threatens a significant privacy interest depends on the consequences likely to ensue from disclosure."). In *Long*, the Second Circuit cited the Office of Personnel Management's (OPM) list of "sensitive" occupation categories across federal agencies, which included "intelligence" and "intelligence clerk/aide." *Long*, 692 F.3d at 189, n. 4. The Court explained that "[i]t is not uncommon for courts to recognize a privacy interest in a federal employee's work status (as opposed to some more intimate detail) if the occupation alone could subject the employee to harassment or attack." *Id.* at 192. In order to reveal private information, such as the name of an individual involved in intelligence, it must be demonstrated that disclosure of the individual's identity sheds light on government activity. *Id.* at 193. The Court concluded that "Exemption 6 permits OPM to withhold the names of employees working in the sensitive agencies and sensitive occupations." *Id.* at 195.

Based on our review and discussion of the three documents at issue, we have determined that the information withheld pursuant to Exemption 6 consists of the personal identities of intelligence agency employees, including the names of authors and those individuals who assisted with the production of the documents as well as intended recipients of one of those documents. In light of the above case law recognizing a privacy interest in protecting the identities of employees in both sensitive agencies and occupations, we conclude that IN properly invoked Exemption 6 to withhold the names of those individuals. *See Long*, 692 F.3d at 192.

Furthermore, there is no public interest in revealing those names, as the names themselves do not shed light on the government's activities. For that reason, and because of the special nature of the work performed by those individuals whose names were withheld, IN properly withheld the names and other personal identifying information of the individuals it redacted pursuant to Exemption 6.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on November 19, 2014, OHA Case No. FIA-14-0082, 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.

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