United States Department of Energy
Office of Hearings and Appeals

In the Matter of [redacted]	)		
	)		
Filing Date: April 20, 2015	)	Case No.:	FIA-15-0021
	)		

Issued: May 20, 2015

Decision and Order

On April 20, 2015, [redacted] filed an Appeal from a determination issued to him on February 23, 2015, by the Federal Bureau of Investigation (FBI) of the Department of Justice. (FBI Request No. 1171162-001). In its determination, the FBI indicated that the Department of Energy (DOE) had deleted some information from documents the FBI had found to be responsive to a request that Mr. [redacted] 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. The DOE withheld portions of those documents under Exemptions 1, 3 and 6 of the FOIA. Because Mr. [redacted]'s appeal is worded very broadly, we will interpret it as challenging all withholdings made by the DOE. This Decision and Order only pertains to the withholdings under Exemptions 3 and 6.[1] Thus, this Appeal, if granted, would require the DOE to release the information it withheld pursuant to Exemptions 3 and 6.

I. Background

In responding to Mr. [redacted]'s FOIA request, the FBI identified records in its possession that contained information that it had obtained from the DOE. Consequently, it consulted with the DOE so that the DOE, as originator of the information, could identify any information that should be protected from public disclosure pursuant to the FOIA. The DOE provided the FBI with copies of the responsive documents with portions deleted on the basis of Exemptions 1, 3, and 6.[2] In his appeal, Mr. [redacted] seeks answers to four questions: whether the DOE or the FBI requested to search his house without his permission; whether the DOE or the FBI ever wiretapped his phone; whether the DOE or the FBI installed surveillance equipment in his home;

[1] This Appeal has been bifurcated, and Mr. [redacted]'s challenge to the DOE's invocation of Exemption 1 to withhold information classified pursuant to an Executive Order will be decided in another matter, OHA Case No. FIC-15-0002. *See* Acknowledgment Letter from William M. Schwartz, Senior Attorney, OHA, to [redacted] (Apr. 24, 2015).

[2] The February 23, 2015, determination letter indicates that information was also withheld from disclosure pursuant to Exemption 7 of the FOIA and pursuant to the Privacy Act, 5 U.S.C. § 552a. The DOE has withheld nothing pursuant to those provisions.

and whether the DOE or the FBI has placed tracking devices on any of his vehicles. E-mail from (b) (6) to Director, Office of Hearings and Appeals (March 21, 2015). In addition, he sought documentation of the results of any such searches, wiretaps, surveillance, and tracking devices, as well as the results of every polygraph test administered to him by either agency. *Id.*

II. Analysis

As an initial matter, with regard to Mr. (b) (6)'s questions, we note that the FOIA is not a mechanism for answering questions. Under the FOIA, agencies are required only to release non-exempt, responsive documents; they are not required to answer questions about any agency's operations. *Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985); *Rodriguez-Cervantes v. HHS*, 853 F. Supp. 2d 114, 116-17 (D.D.C. 2012). Nevertheless, we will deem the appeal a challenge of the DOE's withholding information from the documents the FBI identified as responsive to (b) (6)'s request.

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.

The Office of Intelligence and Counterintelligence (IN) identified the information that the DOE withheld under Exemptions 3 and 6 of the FOIA. In some instances, IN determined that Exemption 1 also applied to the material withheld, as well as Exemption 3 or 6 or both. Where that is the case, we will not address the withholdings, as the Exemption 1 redactions pertaining to classified information will be decided in a separate matter, OHA Case No. FIC-15-0002. Accordingly, we will address the information withheld by the DOE pursuant only to Exemption 3 or Exemption 6, or both.

A. Exemption 3

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).

IN explained that in invoking Exemption 3, it relied on non-disclosure provisions contained in the National Security Act of 1947, 50 U.S.C. § 3001, *et seq.* Memorandum of Conversation between William M. Schwartz, Senior Attorney, Office of Hearings and Appeals (OHA) and IN

representatives (May 12, 2015) (Memorandum). 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.").

We have independently reviewed the content of all redactions taken pursuant to Exemption 3. The information redacted pursuant to Exemption 3 from the documents released to Mr. (b) (6) fall into three categories: (1) information that would identify IN personnel and other personnel who are affiliated with and support intelligence community (IC) functions; (2) information that is not classified or sensitive in itself, but the release of which could reveal classified information that could impact the operational security of the IC; and (3) information that would reveal intelligence methodology. *See* Memorandum. Accordingly, based on our review of the released documents and the information provided by IN, we are satisfied that IN properly invoked Exemption 3 in support of its withholdings pursuant to the National Security Act.

B. Exemption 6

In addition, IN invoked Exemption 6 with regard to many of the same redactions that it made pursuant to Exemption 3 based on the National Security Act. Exemption 6 shields from disclosure "personnel 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); *see also* 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.

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) ("[W]hether 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.

IN stated that it invoked Exemption 6 to withhold the names, phone numbers, locations, and other identifying information about IN employees and others closely affiliated with IN's functions. *See* Memorandum. As such, based on 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 information of the individuals it redacted pursuant to Exemption 6.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by (b) (6) on April 20, 2015, OHA Case No. FIA-15-0021, 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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