United States Department of Energy
Office of Hearings and Appeals

In the Matter of Tim Hadley	)	
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Filing Date: June 20, 2016	)	Case No.: FIA-16-0041
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Issued: July 13, 2016

Decision and Order

On June 20, 2016, Tim Hadley filed an Appeal from a determination issued to him by the Department of Energy's (DOE) Office of the Inspector General (OIG) (Request No. HQ-2016-00941-F). In that determination, OIG responded to a request filed that Mr. Hadley 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. This Appeal, if granted, would require OIG to release the withheld portions of the document that Mr. Hadley requested. [1]

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). 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.

I. Background

Mr. Hadley filed a request with the DOE for an unredacted copy of a document that had previously been provided to him on two occasions: from the Office of General Counsel pursuant to the DOE's *Touhy* regulations, and under section 1553 of Public Law 111-5, the American

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

Recovery and Reinvestment Act of 2009 (ARRA). [2] This document is an OIG Memorandum of Interview (MOI) concerning a complaint that Mr. Hadley filed pursuant to the ARRA.

On June 9, 2016, the OIG released the MOI with names and information "that would tend to identify subjects, witnesses, sources of information, and other individuals" withheld. OIG determination at 1. The OIG determined that this information was exempt from mandatory disclosure pursuant to 5 U.S.C. § 552(b)(6) and (b)(7)(C) (Exemptions 6 and 7(C)), and that discretionary release of the information was not in the public interest.

In his Appeal, Mr. Hadley argues that the DOE is being inconsistent in its treatment of this document, because his name was not withheld, and because another name that Mr. Hadley claims was released to him in another version of the document was withheld here. He further contends that he knows another of the names that was withheld, and that the DOE has not shown that release of this individual's name would result in an invasion of privacy, because this person's whereabouts are unknown and there is no contact information "in the record." Hadley Appeal at 1. Finally, Mr. Hadley argues that the DOE could release either the first or last names of the individuals involved and still protect their identities.

II. Analysis

A. Exemption 6

Exemption 6 shields from mandatory 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). 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 document in question contains information that applies to particular individuals, such as their names and positions.

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

[2] The DOE's *Touhy* regulations establish procedures for members of the public to obtain the production of agency records in connection with legal proceedings in which neither the DOE nor the United States is a party. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

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 Comm.*). 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 identity of individuals mentioned in the document. We have repeatedly found that a significant privacy interest exists that justifies the withholding of the names and identifying information of participants in an OIG investigation. *See, e.g., Bradley P. Jones,* Case No. FIA-15-0058 (2015). In those cases, we have found that disclosure of their identities could result in these individuals being subjected to harassment, intimidation and retaliation. OIG correctly concluded that the people named in the MOI who are not employees of the federal government have a legitimate expectation of privacy under the FOIA.

With regard to information identifying current federal OIG employees, we also 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 federal OIG employee listed in the document also has a significant privacy interest regarding release of the employee's identity in that such a release could subject the employee 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).

Several of Mr. Hadley's arguments concern the privacy interests of the parties named in the MOI. First, he contends that the DOE has been inconsistent in withholding the names involved because one of them, the name of the OIG interviewer, was allegedly disclosed to him in another version of the MOI. In essence, he is claiming that the agency waived, by virtue of this earlier alleged disclosure, its ability to rely on the exemptions claimed.

The U.S. Court of Appeals for the District of Columbia Circuit described the requirements for proving that a waiver has occurred in *Fitzgibbons v. CIA*, 911 F.2d 755 (1990). The Court held that the information requested must (i) be as specific as the information previously released, (ii) match the information previously disclosed, and (iii) have already been made public through an official and documented disclosure. These requirements ensure that the "information sought is truly public and that the requester receive no more than what is publicly available." *Cottone v.*

Reno, 193 F. 3d 550, 555 (D.C. Cir. 1999) (*Cottone*). The requester bears the burden of producing evidence that is sufficient to meet these requirements. *See, e.g., Assassin Archives & Research Ctr. v. CIA*, 334 F. 3d 55 (D.C. Cir. 2003).

As an initial matter, Mr. Hadley has failed to demonstrate that any of these requirements have been met, because he has not submitted any documentation for his claim that the name of the OIG interviewer was previously released to him. Furthermore, even if Mr. Hadley's claim that the name in question was provided to him in a previous version of the MOI is accurate, this disclosure did not place the information in the public domain and did not constitute a waiver of the DOE's ability to withhold it under the FOIA. The Federal Courts have held that compelled disclosure to a single party does not equal release into the public domain. *Lewis v. DOJ*, 609 F. Supp. 2d 80, 85 (D.D.C. 2009). *See also Judicial Watch, Inc. v. DOD*, 963 F. Supp. 2d 6, 15 (D.D.C. 2013) (disclosure of information to single private party not sufficient to establish waiver); *Abrams v. Office of the Comptroller of the Currency*, No. 3:05-CV-2433, 2006 WL 1450525 at *5 (N.D. Tex. May 25, 2006) (agency did not waive Exemption 8 protection when it released information to limited number of people in conjunction with administrative subpoena, as required by agency regulations).

In this case, the MOI was released to Mr. Hadley alone under section 1553(b)(4) of the American Recovery and Reinvestment Act of 2009, 111 P.L. 5, which requires that claimants under the Act have access to investigative files, and under the DOE's *Touhy* regulations, 10 C.F.R. Part 202, Subpart B, which sets forth the procedures for the production or disclosure of information in response to subpoenas or other demands of courts and other authorities. It is therefore evident that the MOI was released to a single party because of legislative or regulatory requirements, and is therefore not "truly public" within the meaning of *Cottone* and the other cases cited above.

Next, Mr. Hadley claims to already know another of the names that was withheld, and he contends that release of this name would not compromise the individual's privacy interests because Mr. Hadley does not know where this person is, and the person's contact information is not "in the record." Therefore, Mr. Hadley reasons, there would be no way to contact the individual, and no potential for harassment, retaliation, or coercion. He further argues that this individual's privacy could be protected just as effectively by releasing either this person's first or last name, given the large number of U.S. residents who share one of these names. We do not find these arguments to be persuasive, primarily because they would require the DOE to perform the virtually impossible task of determining what else a requester knows about the individuals named in such documents before reaching a conclusion as to whether disclosure of their names, in whole or in part, would potentially subject them to harassment, retaliation or coercion. Mr. Hadley has cited no case law, either judicial or administrative, that would require such a result. [3]

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

[3] We also find no inconsistency in the OIG's disclosure of Mr. Hadley's name to Mr. Hadley, while withholding the identities of other individuals named in the MOI. Whereas the OIG correctly determined that a protectable privacy interest exists with respect to those individuals, disclosure of information about a person to that person does not constitute an invasion of privacy. *See, e.g., Reporters Comm.*, 489 U.S. at 771; *DOJ v. Julian*, 486 U.S. 1, 13-14 (1988).

activities of the government. It is clear that release of the names of people not employed by the federal government would not further the public interest by shedding light on the operations and activities of the government, and would contribute little, if anything, to public understanding of the issues surrounding this investigation. We therefore find that the public interest in release of these names is minimal at best. *Elec. Frontier Found. v. Office of the Director of Nat'l Intelligence,* 639 F.3d. 876, 888 (9th Cir. 2010).

With regard to the name of the OIG interviewer, the courts have generally not found that release of individual federal employee names sheds any significant light on the workings of a federal agency. *See Voinche v. FBI,* 940 F.Supp. 323, 330 (D.D.C. 1996) (finding 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 identity of the OIG employee. Consequently, we find that there is no public interest that would be furthered by release of this information. For the reasons set forth above, we find that OIG correctly applied Exemption 6 in withholding the information in question.

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).

The analysis is similar to the analysis conducted under Exemption 6, but with two significant differences. First, Exemption 7(C) applies to a much narrower class of documents than Exemption 6 in that the information must have been compiled for law enforcement purposes. Second, Exemption 7(C) has a less exacting standard for withholding information 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. However, since Exemption 7(C) allows an agency to withhold information where there is only a reasonable expectation of an "unwarranted invasion of personal privacy," it has a lower threshold than Exemption 6 where the balancing test calls for a "clearly unwarranted invasion of personal privacy."

We have reviewed the information withheld, and we find that it was compiled for law enforcement purposes. Since the information meets Exemption 6's more exacting threshold, and since we have already indicated that the information was properly withheld under that Exemption, we will also uphold OIG's application of Exemption 7(C).

III. Conclusion

After reviewing Mr. Hadley's Appeal, we are convinced that OIG properly withheld the information in question under Exemptions 6 and 7(C) of the FOIA. Accordingly, that Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Tim Hadley, Case No. FIA-16-0041, 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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