United States Department of Energy
Office of Hearings and Appeals

In the Matter of Ronald Freeman	)	
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Filing Date: May 4, 2017	)	Case No.: FIA-17-0010
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Issued: May 24, 2017

Decision and Order

On May 4, 2017, Ronald Freeman (Appellant) filed an Appeal from a determination issued by the Department of Energy's (DOE) Oak Ridge Office (ORO) (FOIA Request No. ORO-2017-00708-F). In that determination, ORO 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. ORO released nine responsive documents to the Appellant, but withheld certain information under Exemption 6 of the FOIA. The Appellant challenged ORO's use of Exemption 6. This Appeal, if granted, would require ORO to release some or all of the withheld information.

I. Background

On March 14, 2017, the Appellant requested "the last performance appraisals for all attorneys in the Office of Chief Counsel." Determination Letter at 1 (April 27, 2017). In response, ORO located nine responsive documents. *See id*. However, ORO withheld the following portions of the documents under Exemption 6: critical element performance ratings, rating official's comments, critical element aggregate totals, summary ratings, employee comments, an employee identification number, and performance awards and pay adjustments. *Id.* To justify its withholdings, ORO stated that the documents contained information in which the individuals have a privacy interest, release of the information could subject the individuals to undue embarrassment or unwelcome attention, and no public interest would be served by its release. *Id.* On May 4, 2017, the Appellant challenged ORO's determination. Appeal at 1 (May 4, 2017). The Appellant argues that the public interest in the present case outweighs the individuals' privacy interest because the public has a high interest in knowing the government's employee performance standards and the circumstances involve the misconduct of agency officials. *See id*. As to the latter, the Appellant alleges that management changed his performance evaluations as an act of retaliation after he filed an Equal Employment Opportunity (EEO) complaint of discrimination. *See id.* The Appellant also asserts that management told him that other employees received similar ratings to his own. *Id.*

Therefore, the Appellant argues, the public has a strong interest in "knowing the rating of other similarly situated employees." *Id.*

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 exemptions 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).

Exemption 6 of the FOIA 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 determining whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine if a significant privacy interest would be compromised by the disclosure of the information. *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989); *see also Ripskis v. Dep't of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). If the agency cannot find a significant privacy interest, the information may not be withheld. *Horner*, 879 F.2d at 874. Second, if an agency determines that a privacy interest exists, the agency must then determine whether the release of the information would further the public interest by shedding light on the operations and activities of the government. *Id.*; *Reporters Comm. for Freedom of the Press v. Dep't of Justice*, 489 U.S. 749, 773 (1989). 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. *Horner*, 879 F.2d at 874.

The information ORO withheld under Exemption 6 essentially consists of three categories of information: (1) employee performance ratings and comments; (2) employee identification numbers; and (3) SES performance awards and pay adjustments. In considering whether ORO properly applied Exemption 6, we first note that Exemption 6 has a threshold requirement in that the records at issue must be "personnel and medical files and similar files." Here, ORO stated that the information it redacted qualifies as "similar files" because "it is information in which the individual has a privacy interest." Determination Letter at 1. Since the redacted information consists of information pertaining to specific individual personnel files, we agree with ORO's finding that the information qualifies as "similar files." *See Washington Post*, 456 U.S. at 602 (all information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection). Next, we will apply the three-step analysis to the three categories of redacted information.

A. Performance Ratings and Comments

We find that significant privacy interests would be implicated by the release of the employees' performance ratings and the comments accompanying the ratings. While the release of mediocre or poor ratings could result in humiliation, even the release of favorable ratings can cause embarrassment, jealousy, or possible harassment. *See Barbara Lloyd*, Case No. FIA-15-0032 (2015); *Linda Dunham*, Case No. TFA-0286 (2009).

Turning to the public interest, we agree that the release of the performance evaluation information could shed light on how the government assesses its employees. *Linda Dunham*, Case No. TFA-0286 (2009). The Appellant cites *Columbia Packing Co., Inc. v. Dept. of Agric.*, 563 F.2d 495 (1st Cir. 1977), to support his contention that the public has a strong interest in the requested performance evaluations because they relate to management misconduct. *See* Appeal Letter. In *Columbia Packing Co., Inc.*, the court recognized that "the public has an interest in whether public servants carry out their duties in an efficient and law-abiding manner." 563 F.2d at 499. However, "if a FOIA requester asserts a public interest in uncovering Government deficiencies or misfeasance, the requester must produce evidence to support that public interest." *Jurewicz v. U.S. Dep't of Agric.*, 891 F. Supp. 2d 147, 157 (D.D.C. 2012). Here, the Appellant does not provide any evidence of misconduct to demonstrate a public interest in uncovering misfeasance: the Appellant merely asserts that he believes management changed his performance appraisals in retaliation for making an EEO claim.

On balance, we find that the public interest in the performance ratings is outweighed by the harmful effects disclosure could have on employee morale and workplace efficiency. *See, e.g., Linda Dunham*, Case No. TFA-0286 (2009). In *Ripskis*, the District of Columbia Circuit Court of Appeals found that the release of employee performance ratings could likely "spur unhealthy comparisons among . . . employees and thus breed discord in the workplace" and likely "chill candor in the evaluation process as well." 746 F.2d at 3. Similarly, the comments made by the employee and rating officials could indicate the nature of the employee's performance rating, or even the rating itself. *See Linda Dunham*, Case No. TFA-0286 (2009). In the instant case, disclosure of the information would constitute a clearly unwarranted invasion of the employees' personal privacy. We therefore find that ORO appropriately withheld the performance ratings and comments.

B. Employee Identification Number

Employees have a privacy interest in their employee identification number. *Steven R. Schooley*, Case No. TFA-0398 (2010). Release of that information would reveal personal information about the employees and could subject them to unwarranted invasions of their personal privacy. Furthermore, disclosing employee identification numbers would shed little or no light on government activities. Thus, the privacy interest the employee has in his employee identification number outweighs any public interest in its disclosure. We, therefore, find that ORO appropriately withheld the employee identification number.

C. Performance Awards and Pay Adjustment

A federal regulation requires that certain federal employee information be made available to the public. 5 C.F.R. § 293.311(a). That information includes "present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials)." 5 C.F.R. § 293.311(a)(4). The regulation provides an exception, however, where disclosure of the enumerated information (i) would reveal other information that would constitute a clearly unwarranted invasion of personal privacy or (ii) is otherwise protected from disclosure under a FOIA exemption. 5 C.F.R. § 293.311(b). Under a general application of that regulation, ORO would be required to disclose the performance award information that the Appellant has requested unless the first clause of the regulation's exception provision applies: disclosing an employee's performance award amount would reveal the employee's performance rating, which would constitute a clearly unwarranted invasion of the employee's personal privacy.

SES performance awards and adjustments are mathematically linked to performance ratings. Telephone Memorandum of Conversation between the DOE Office of Corporate Executive Management (OCEM) and OHA (May 15, 2017). The DOE annual Awards and Compensation Guidance (Guidance) provides the guidelines for determining SES awards and adjustments based on an employee's performance. Guidance at 1 (October 6, 2016). The Appellant, a DOE employee, has access to the Guidance. Telephone Memorandum of Conversation between OCEM and OHA (May 18, 2017). In fiscal year 2016, the Guidance allowed specific ranges of performance-based pay awards for different rating levels. Guidance at 1. For instance, a rating level of five provided a specific performance award range, while a rating level of 4 provided a different range. *Id.* Performance adjustments similarly had percentages pegged to specific performance ratings. *Id.* at 2. Therefore, the performance ratings of employees who received performance awards or adjustments can be mathematically derived from the amount they received. Furthermore, an employee would not have been eligible for a performance award unless he or she received a threshold rating. *See id.* at 1. Thus, the absence of a performance or adjustment award would likely indicate that an employee performed at the lower level. Consequently, in this case the employee's performance award or adjustment, or failure to receive a performance award or adjustment, reveals information about his performance rating. Because we have determined that disclosure of performance ratings would constitute a clearly unwarranted invasion of personal privacy, we conclude that disclosure of the performance award and adjustment amount generated under the ORO Guidelines likewise constitutes a clearly unwarranted invasion of personal privacy. We therefore find that ORO properly withheld this information from disclosure under Exemption 6.

III. Conclusion

For the reasons stated above, we have concluded that ORO appropriately applied Exemption 6 to withhold information from the documents it released to the Appellant. We will therefore deny the present Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Ronald Freeman, Case No. FIA-17-0010, 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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Poli A. Marmolejos
Director
Office of Hearings and Appeals
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